(1)

90-1020

No. _____

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF WAYNE, MICHIGAN,

Petitioner,

v

LINDA HARTLEY RUSHING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

– AND APPENDIX –

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QUESTION PRESENTED

WAS *CITY OF CANTON* v *HARRIS*, 489 U.S. 378, 109 S.CT 1197, 101 L.Ed.2d 412 (1989), MISAPPLIED IN HOLDING WAYNE COUNTY LIABLE UNDER 42 U.S.C. § 1983 WHERE RESPONDENT, WHILE SUICIDAL IN THE WAYNE COUNTY JAIL, WAS STRIPPED OF HER CLOTHES AND CLAIMS TO HAVE BEEN SEEN BY MALES, AND WHERE THERE EXISTED A COURT-MANDATED POLICY REQUIRING THE STRIPPING OF SUICIDAL JAIL INMATES AND THE PROOFS SUBSTANTIATE THAT A JAIL POLICY PROHIBITED THE EXPOSURE OF STRIPPED FEMALE INMATES TO MALES?

LIST OF PARTIES

Petitioner is the County of Wayne, Michigan.

Respondent is Linda Hartley Rushing.

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No. _____

In The

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COUNTY OF WAYNE, MICHIGAN,

Petitioner,

v

LINDA HARTLEY RUSHING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

County of Wayne, Michigan (Wayne County), hereby petitions for a writ of certiorari to review the judgment and opinion of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court was issued on September 20, 1990 and is reported at 436 Mich. 247 (1990) (App., *infra*, A-1). The opinion of the Michigan Court of Appeals was issued on June 10, 1984 and is reported at 138 Mich. App. 121, 358 N.W.2d 904 (1984) (App., *infra*, A-55). The trial court granted the motion for directed verdict on November 20, 1981.

JURISDICTION

The opinion of the Michigan Supreme Court was entered on September 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV, § 1) provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured-in an action at law . . .

STATEMENT

In 1971, a group of inmates of the Wayne County Jail filed a Complaint in the Wayne County Circuit court alleging that conditions in the Wayne County Jail deprived them of their state and Federal constitutional rights. A three-judge panel of the Wayne County Circuit Court conducted hearings for 13 months on jail conditions. *Wayne County Jail Inmates, et al.* v *Lucas, et al.*, 391 Mich. 359, 216 N.W.2d 910 (1974). The three-judge panel found that conditions at the jail violated the inmates' Federal constitutional rights. *Id.* The Court ordered that judicial supervision of the jail begin to make the jail "suitable and sufficient" for inmates. *Id.* The Court appointed a monitor to determine compliance with the Court's orders and to report to the Court. *Id.*

From that time until present, the Wayne County Circuit Court has maintained judicial supervision of the Wayne County Jail and has periodically by order issued policies and procedures to bring the jail into compliance with the Federal Constitution. Both the

Michigan Court of Appeals and the Michigan Supreme Court have, at various times during the litigation, affirmed the Wayne County Circuit Court's orders.

On March 18, 1976, as part of the Court's supervision of the jail, the three-judge panel of the Wayne County Circuit Court issued a 13-page, 40-paragraph Order on suicide prevention at the jail (App., *infra*, A-116).

The Order was so comprehensive and detailed that, on reviewing the Order several years later, the Michigan Court of Appeals said:

> These court orders were so explicit and left so little to the discretion of the sheriff and jail administrator that the duties of those officials under the order must be classified as ministerial.
>
> *Layton* v *Quinn*, 120 Mich. App. 708, 328 N.W.2d 95 (1982)

The suicide prevention order required members of the sheriff's department to remove all clothing except for "brief underwear bottoms" from potentially suicidal inmates (App., *infra*, A-116, ¶ 15). The Order further required that "if there is a reasonable doubt whether an inmate should be classified as non-suicidal or potentially suicidal, the inmate shall be classified as potentially suicidal" (App., *infra*, A-116, ¶ 10).

Additionally, the March 18, 1976 suicide prevention order kept in full force and effect "the provisions concerning surveillance of suicidal inmates, as set forth in this Court's Order of June 19, 1975" (App., *infra*, A-116, ¶ 39).

The June 19, 1975 Order mandates, in relevant part, that potentially suicidal inmates "should be actually observed intensively, with extreme vigilance." The

Order mandates observance of suiidal inmates by jail personnel every five minutes or more frequently. The Order reiterates that the sheriff "should provide for actual, intense, and vigilant observation by jail staff members of all potentially suicidal inmates either directly by the human eye or indirectly through television monitoring." Both the 1975 and 1976 orders are silent as to what gender the observer of suicidal inmates should be.

The testimony and evidence in this case, however, is that it was the policy and custom at the Wayne County Jail not to allow males on the female ward of the jail except in emergencies or at times of staffing shortages. When a male was on the female ward, the practice was that the male's presence would be announced and a female deputy would accompany the male onto the ward.[1]

Three months after the 1976 suicide prevention order was entered by the Court, Respondent in this action was taken to the Wayne County Jail by Detroit Police to be housed as a pre-trial detainee (Plaintiff's Amended Complaint, App., *infra*, A-104, ¶¶ 12, 14).

Respondent was housed at the Wayne County Jail from June 8, 1976 through June 12, 1976 (Trial Transcript, Vol. III, p. 41). On June 9, 1976, Respondent's sister telephoned the jail and informed jail personnel that Respondent had threatened to commit suicide (Trial Transcript, Vol. IX, p. 85).

In accord with the Court Order of March 18, 1976, Respondent's clothes were removed except for her underpants (App., *infra*, A-104, ¶ 15).

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[1] Trial testimony of Jail Administrator Frank Wilkerson and testimony of Sgt. M. A. Clipper, a female sheriff's deputy and shift commander for 18 years at the Wayne County Jail.

The Jail psychologist, You Kim, interviewed Respondent and found her to be suicidal acute, but not psychotic (Trial Transcript, Vol. IX, p. 120). Respondent remained in jail clothed in her underpants until June 12, 1976, when she was released from jail on bond.

In 1977, Respondent filed a Complaint against the City of Detroit, Daniel Knepp (the Detroit Police officer who had arrested Respondent), the County of Wayne, You Kim (the jail psychologist) and Milas Lebedevitch (the jail psychiatrist).

Respondent amended her Complaint in 1978.

Respondent's Amended Complaint alleges, in relevant part, that while Respondent was in a "suicidal state" (App., *infra*, A-104, ¶ 19), Defendants Kim and Lebedevitch violated 42 U.S.C. § 1983 by keeping Respondent unclothed except for her underpants "in the view of other women, and in the view of several male employees" (App., *infra*, A-104, ¶ 15).

The Amended Complaint avers generally that Wayne County violated Respondent's constitutional rights.

Respondent's claims were tried to a jury.[2] At the close of Respondent's proofs, Wayne County moved for a directed verdict regarding Respondent's § 1983 claims. The trial court granted the motion.

The remainder of the case was sent to the jury. The jury found no cause of action on all claims against all defendants, i.e., they jury found:

1. As to Respondent's claim for violation of her constitutional rights, the jury found in favor of Milas Lebedevitch of No Cause of Action.

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[2] Respondent and the City of Detroit and Daniel K. Knepp settled their lawsuit.

2. As to Respondent's claim for violation of her constitutional rights, the jury found in favor of Defendant You Kim of No Cause of Action.

3. As to Respondent's claim for intentional infliction of emotional distress, the jury found in favor of Defendant Milas Lebedevitch of No Cause of Action.

4. As to Respondent's claim for intentional infliction of emotional distress, the jury found in favor of Defendant You Kim of No Cause of Action.

5. As to Respondent's claim for malpractice (professional negligence) against Defendant Milas Lebedevitch, the jury found in favor of Defendant of No Cause of Action.

6. As to Respondent's claim for negligence against Defendant You Kim, the jury found in favor of Defendant of No Cause of Action.

7. Additionally, the jury found "We, the jury, find in favor of the Defendant, County of Wayne of No Cause of Action." (Trial Transcript, vol. XXI, p. 39).

Respondent appealed the verdicts on multiple grounds and in summary fashion also appealed the trial court's granting of Wayne County's motion for directed verdict. The Court of Appeals affirmed the trial court.

Respondent sought Leave to Appeal to the Michigan Supreme Court. Leave was granted on February 5, 1986 (App., *infra*, A-54). Briefs were submitted and oral arguments heard.

The Michigan Supreme Court then vacated its grant of leave to appeal on March 29, 1988 "because the Court is no longer persuaded that it should review the questions presented" (App., *infra*, A-53).

Respondent made a Motion for Re-hearing.

Almost two years later, on December 26, 1989, the Michigan Supreme Court vacated its order denying leave to appeal and ordered this case be re-argued with supplemental briefs "limited to the issue whether the trial judge correctly granted Defendant County's motion for a directed verdict on the question of Defendant's municipal liability under 42 U.S.C. § 1983 in light of *City of Canton* v *Harris*, 489 U.S. [378] (1989)" (App., *infra*, A-52).

Respondent's Supplemental Brief raised for the first time Wayne County's failure to adequately train jail personnel. Respondent did not plead failure to train in either her Complaint or her Amended Complaint. Respondent did not raise the issue at trial, did not present proofs on the matter and did not ask that the question be submitted to the jury. Respondent did not raise the failure to train issue in the Court of Appeals. And, Respondent did not raise the issue of failure to train in the Michigan Supreme Court. Not until Respondent was instructed by the Michigan Supreme Court to re-submit her brief in light of *City of Canton, supra,* did Respondent raise a "failure to train evidencing deliberate indifference" theory.

After the case was re-briefed and re-argued, the Michigan Supreme Court upheld the trial court and the Court of Appeals in part and reversed in part. The Michigan Supreme Court "reverse[d] the judgment of the Court of Appeals only with respect to the portion of Ms. Rushing's municipal liability claim under 42 U.S.C. § 1983 involving her allegedly unnecessary exposure to members of the opposite sex."

The Michigan Supreme Court said that:

> [A] reasonable jury could have found that the failure of the county to implement appropriate safeguards to protect against [exposure of semi-clothed inmates to observation by members of the opposite sex could have] . . . constituted a deliberate indifference to and [was the] moving force behind the deprivation of her constitutional rights.
>
> App., *infra*, A-1, Introduction

The Michigan Supreme Court remanded the case to the trial court for further proceedings.

Justices Griffin and Cavanagh dissented, saying "the record indicates at worst, that on this particular occasion a sound program was negligently administered. Under the analysis provided by *City of Canton*, this is not sufficient to impose § 1983 liability on Wayne County."

The dissent points out:

> It should not be overlooked that plaintiff did not raise the issue of defendant's failure to train jail personnel either in the trial court or the Court of Appeals. Plaintiff presented no evidence, whatsoever, that defendant either inadequately trained or altogether failed to train its employees. . . . Due to plaintiff's failure to pursue a theory of liability predicated upon Wayne County's failure to train, this Court is, in effect, saying to plaintiff "here, you missed a potential theory of liability — have another go at it."
>
> 436 Mich. at 291 n. 8.

Wayne County petitions for a writ of certiorari.

REASONS FOR GRANTING PETITION

Wayne County seeks a writ of certiorari because:

1. The decision of the Michigan Supreme Court in the instant case is contrary to the holdings of this Court.
2. The decision in the instant case conflicts with other circuits.
3. This case presents important questions of federal law which have not been, but should be, settled by this Court, i.e., whether detainees in a correctional facility have a constitutional right of privacy and whether a county can be liable for implementing a judicially-mandated order.

I.

THE DECISION IS CONTRARY TO THE HOLDINGS OF THIS COURT.

In *City of Canton, supra,* this Court held:

> [O]ur first inquiry in any case alleging municipal liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.

City of Canton instructs that to hold an entity liable under § 1983 there must first exist a municipal policy. Second, there must be a constitutional deprivation. And third, there must be a causal link between the defective municipal policy and the alleged constitutional violation. Finally, this Court requires more: a municipality can be held liable under § 1983 only if its policy failure represents deliberate indifference to constitutional rights.

Accordingly, Justice O'Connor points out "the Court's opinion correctly requires a high degree of fault . . . before an omission can support liability." *Id.*, 109 S.Ct. at 1208.

In the instant case, none of the *Canton* requirements is met.

First, the Michigan Supreme Court has remanded this case to the trial court for further proceedings "only with respect to . . . [Respondent's claim] involving her allegedly unnecessary exposure to members of the opposite sex" (App., *infra*, A-1, Introduction).

To properly evaluate this claim, it is necessary to remember that at the time Respondent was housed in the jail, the jail was under judicial supervision. And at the time there existed two court orders specifically concerning suicidal inmates and their observation.

Both orders were issued to bring the jail into compliance with federal constitutional requirements. Both orders required "actual, intense and vigilant observation by jail staff members of all potentially suicidal inmates."

Significantly, both orders are silent as to any gender requirement for the jail staff members who observe inmates. Had the Court believed that the constitution was being violated by opposite-sex observation of inmates, it could have corrected the deficiency by either the 1975 or 1976 order. It did not.

Respondent, herself, has not attacked the 1975 and 1976 Court orders as unconstitutional.

Second, Respondent's claim of a constitutional deprivation must fail, since in 1976 there was no "clearly established" right of privacy for detainees. *Fisher* v *Washington Metropolitan Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982). And, under § 1983 jurisprudence Wayne County cannot be held liable even if a violation occurred,

since the violation (if there was one) was not "clearly established" at the time of the incident. *Anderson* v *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

More fundamentally, however, Petitioner contends that there was no unconstitutional policy in this case — and certainly no unconstitutional policy for which Petitioner is liable — since Wayne County's only policy was to not allow members of the opposite sex to view semi-clothed inmates. If that policy was violated, it was violated solely by individuals on personal pursuits and Wayne County cannot be held liable on a *respondeat superior* theory, nor would such an individual be acting under color of state law.. *Monell* v *New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Stengel* v *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975, cert. dismissed 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Rembert* v *Holland*, 735 F.Supp. 733 (W.D. Mich. 1990).

Pembaur v *City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), distinguished the acts of a municipality's employees from the acts of the municipality to "thereby, make clear that municipal liability is limited to the actions for which the municipality is actually responsible."

The testimony and evidence in the instant case is straightforward and uncontradicted: The policy of keeping suicidal inmates semi-clothed was the policy of the Court imposed on Wayne County. All rules governing implementation of that policy were contained in the "Order Regarding Suicide Prevention Plan" issued by the Court on March 18, 1976 and in the Order of June 19, 1975.

Further, the uncontradicted trial testimony in this case is that Wayne County had a practice and custom of

not allowing males on the female ward at the jail and, if the policy and custom was violated in this case, such a violation was contrary to Wayne County's policy and custom.

The evidence, at most, showed that if this policy was violated, that violation did not constitute "a pattern of constitutional violation [that] could put the municipality on notice that its officers [were reacting] in a manner contrary to constitutional requirements." *City of Canton, supra* (O'Connor, J., concurring in part and dissenting in part).

The existence of a policy, or non-existence of a policy, amounting to deliberate indifference to constitutional rights, cannot be established by inference solely from evidence of the occurrence of the incident in question. *City of Oklahoma City* v *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 79 (1985). Other evidence must be introduced. *Fiacco* v *City of Rensselaer, N.Y.*, 783 F.2d 319 (2d Cir. 1986). None was.

Certainly, if a constitutional violation were occurring at the jail, one could reasonably expect that the Court Order regarding suicide prevention would have addressed such an issue. Certainly if the Court was not on notice of a violation, and attorneys for the Wayne County jail inmates were not on notice of such a violation, Wayne County cannot be held to be on notice of a violation.

The instant case is the case of a Plaintiff looking for a Defendant. The jury in this case found no cause of action for the individually-named defendants and for Wayne County. The judiciary is immune. Respondent is attempting to hold Petitioner liable under a theory which she neither pled nor tried. Respondent is attempting to expand municipal liability under *City of Canton, supra*, in a way this Court never intended.

As stated in *Canton:*

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident [citations omitted]. Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liabilities on municipalities — a result we rejected in *Monell*, 436 U.S. at 693-694, 98 S.Ct. at 2037. It would also engage the federal courts in an endless exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism. Cf. *Rizzo* v *Goode*, 423 U.S. 362, 378-380, 96 S.Ct. 598, 607-608, 46 L.Ed.2d 561 (1976).
>
> *City of Canton* v *Harris*, 489 U.S. at ___, 109 S.Ct. at 1206.

In this case, not only does Petitioner not have an unconstitutional municipal policy, but, further, there has been no proof that Respondent has been deprived of a particular right secured by the Constitution and the laws of the United States. *Martinez* v *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

The same year that Respondent filed her Complaint in this matter, this Court decided the case of *Dothard* v *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), balancing an inmate's privacy against the Title VII rights of female corrections officers to employment in jails and prisons.

Although the issues in *Dothard, supra,* are dissimilar from the issues in the present controversy, it is interesting and relevant to note that nowhere in the *Dothard* decision did this Court hold that an inmate has a constitutional right not to be viewed by members of the opposite sex.

This Court denied certiorari in 1980 in a Federal district case that suggested that since inmates are constantly on view to same-sex guards and fellow inmates while nude or performing bodily functions, the privacy of inmates has already been eroded in the interest of institutional convenience, security and efficiency, and would not be significantly further eroded by viewing of opposite-sex guards. *Gunther* v *Iowa State Men's Reformatory,* 462 F. Supp. 952, aff'd 621 F.2d 1079, cert den'd 446 U.S. 966 (1980).

Subsequent to *Dothard, supra,* cases around the country have held that an inmate's privacy must be balanced against the legitimate penological objective of providing equal job opportunities regardless of sex. *See,* for example, *Avery* v *Peron,* 473 F. Supp. 90 (D.N.H. 1979); *Forts* v *Ward,* 471 F. Supp. 1095 (S.D.N.Y. 1979).

In this case, Respondent failed to show that Wayne County had an unconstitutional policy. She failed to show that she was deprived of a constitutional right. She failed to establish a cognizable § 1983 claim. Therefore, the Michigan Supreme Court's application of a deliberate indifference standard is inappropriate to this case.

The failure of Respondent's case is summed up in Justice Griffin's dissenting opinion in this case:

> The record indicates, at worst, that on this particular occasion a sound program was negligently administered. Under the analysis provided by *City of Canton,* this is not sufficient to impose § 1983 liability on Wayne County.

II.

THIS DECISION CONFLICTS WITH OTHER CIRCUITS.

As circuits around the country begin to interpret and apply this Court's holdings in *City of Canton, supra*, it is apparent that the instant case is in conflict with other circuits.

In *Buffington* v *Baltimore County*, 913 F.2d 113 (4th Cir. 1990), the Court held that Baltimore County was entitled to judgment as a matter of law because under *City of Canton, supra*, "a direct causal link must exist between a specific deficiency in training and the particular violation alleged." In *Buffington*, the Court found no proximate cause between Mr. Buffington's suicide and a failure to train. The Court said "we do not think the evidence was sufficient under *Canton* to permit a jury to find that a policy of failure to train officers in suicide prevention actually and proximately caused the particular harm that occurred here."

In the instant case, Respondent never alleged a failure to train until her second brief to the Michigan Supreme Court. Not only did she never allege a specific deficiency in training, she also did not show the causal connection between any lack of training and the particular deprivation, if there was any, that occurred here.

In *City of Canton, supra*, Justice O'Connor noted that a failure to train can amount to a custom or a policy where "it can be shown that the policy makers were aware of, and acquiesced in, a pattern of constitutional violation involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular

basis, and that they often react in a manner contrary to constitutional requirements."

In this case, there is no showing that Wayne County had an unconstitutional policy. There was no showing that a constitutional deprivation occurred and there was no showing that the municipality was on notice that its officers react in a manner contrary to constitutional requirements.

CONCLUSION

For the foregoing reasons, the order of the Michigan Supreme Court should be vacated and the order of the Michigan Court of Appeals upheld, or alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: December 18, 1990

APPENDIX TO PETITION FOR CERTIORARI

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ORDER

(State of Michigan — Supreme Court)

(Entered September 20, 1990)

(LINDA HARTLEY RUSHING, Plaintiff-Appellant, v WAYNE COUNTY (Wayne County Sheriff's Department), YOU KIM and MILAS LEBEDEVITCH, Jointly and Severally, Defendants-Appellees — SC: 74724; CoA: 061678; LC: 77-724529-NZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgments of the Court of Appeals and the Circuit Court for the County of Wayne are VACATED and the cause is REMANDED to the Circuit Court for the County of Wayne for further proceedings in conformity with the opinions filed herein.

(Certification Omitted)

OPINION

(State of Michigan — Supreme Court)

(Filed September 20, 1990)

(LINDA HARTLEY RUSHING, Plaintiff-Appellant, v WAYNE COUNTY (Wayne County Sheriff's Department), YOU KIM and MILAS LEBEDEVITCH, Jointly and Severally, Defendants-Appellees — No. 74724)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

SYLLABUS: RUSHING v WAYNE COUNTY

(Prepared by the Reporter of Decisions, William F. Haggerty)

Docket No. 74724. Argued May 10, 1990
(Calendar No. 1) Decided September 20, 1990

Linda H. Rushing brought an action under 42 USC 1983 in the Wayne Circuit Court against Wayne County and county employees, You Kim, a psychologist, and Milas Lebedevitch, a psychiatrist, claiming constitutional deprivations sustained when she was kept in a seminaked state as part of a suicide prevention plan while a pretrial detainee at the Wayne County Jail and exposed to repeated observation by members of the opposite sex. The court, James A. Hathaway, J., directed a verdict for the county and entered judgment on a jury verdict for Mr. Kim and Dr. Lebedevitch. The Court of Appeals, Brennan, P.J., and Cynar and C. W. Simon, Jr., JJ., affirmed in an opinion per curiam (Docket No. 61678). The Supreme Court initially granted leave to appeal, 424 Mich 876 (1986), then vacated its order and denied leave to appeal following oral argu-

ment. 430 Mich 867 (1988). The plaintiff's motion for reconsideration was held in abeyance pending the decision of the United States Supreme Court in *City of Canton* v *Harris*, 489 US 378 (1989). Leave to appeal was granted, limited to the issue whether the trial court properly granted the county's motion for directed verdict. 433 Mich 917 (1989).

In an opinion by Justice Brickley, joined by Justices Levin and Archer, and an opinion by Justice Boyle, the Supreme Court *held:*

The directed verdict was improper. The jury could have found that the county's actions amounted to deliberate indifference. The policies of the sheriff and the jail administrator regarding the operation of the jail were attributable to the county. [The county is not shielded from liability under 42 USC 1983 by Const 1963, art 7, 6.]

1. For purposes of liability under 42 USC 1983, it is immaterial whether the state-law immunity derives from a statute, the common law, or a provision of the state constitution; conduct wrongful under § 1983 cannot be immunized by state law. Thus, the sheriff may not maintain an immunity defense based on the state constitution. Additionally, as a matter of law, the policies of the sheriff and the jail administrator regarding the operation of a jail are attributable to the county. Under *City of Canton* v *Harris*, a municipality may be held liable under 42 USC 1983 for constitutional violations resulting from its failure to train municipal employees. In general, a program must be adequate to enable employees to respond properly to the usual and recurring situations with which they must deal, and a deficiency in a training program must actually cause and be closely related to the ultimate injury.

2. In this case, a reasonable, properly instructed jury could have found in favor of the plaintiff. With respect to the failure of jail policymakers to adequately train jail personnel, the jury could have found not only that the policymakers failed to instruct employees in the constitutional limitations on the stripping and exposure of inmates, but also to formulate any policy in this regard. Further, the jury could have viewed this failure as a manifestation of a deliberate indifference to the sort of deprivation allegedly experienced by the plaintiff and that the occurrence of such a deprivation was an obvious result of the recently adopted suicide prevention plan.

3. The Court of Appeals applied an improper standard of review and concluded that the plaintiff's proofs did not demonstrate a deliberate indifference on the part of the jail policymakers. The proper inquiry would have been whether a reasonable jury could have concluded that the deliberate indifference standard had been satisfied. Applying this standard, a reasonable jury, properly instructed, could have reached this conclusion, requiring vacation of the judgments of the Court of Appeals and the Wayne Circuit Court regarding the plaintiff's claim of violation of her constitutional rights under § 1983 and remand for further proceedings with respect to whether the county is liable.

Justice Boyle concurred in the lead opinion because the defendant did not dispute the existence of the plaintiff's protected liberty interest in not being exposed to members of the opposite sex. The trial court also erred in granting a directed verdict in favor of Wayne County with respect to the plaintiff's claim that she was deprived of medical treatment while detained in the Wayne County Jail. The evidence showed a policy which grants complete discretion to the psychiatric

staff with regard to when or whether to review or continue treatment of a person who, having been classified as potentially suicidal, is stripped and placed in a jail cell nude except for underpants. Upon the basis of the evidence presented at trial, the jury could have found that the policy evinced deliberate indifference to the serious medical needs of potentially suicidal prisoners.

A local government is subject to liability under § 1983 when execution of its policy or custom inflicts injury. The Due Process Clause of the Fourteenth Amendment requires the government to provide needed medical treatment to pretrial detainees. Ample evidence was presented from which the jury could have concluded that it was the policy of Wayne County to cede total discretion regarding the psychiatric treatment of stripped inmates to the jail psychiatrist or psychologist. This policy of complete nonsupervision of such personnel is actionable under § 1983 if it constitutes deliberate indifference to the rights of individuals with whom the personnel come in contact. The case should be remanded for retrial with regard to the plaintiff's theory that the county's policy of ceding total discretion regarding the treatment and review of suicidal and stripped inmates evinced deliberate indifference to the serious medical needs of the plaintiff.

Vacated and remanded.

Justice Griffin, joined by Justice Cavanagh, dissenting, stated that viewed in a light most favorable to the plaintiff the evidence indicates that at worst, on this particular occasion, a sound program was negligently administered. The trial court properly granted a directed verdict in favor of Wayne County because the plaintiff failed to establish a prima facie case showing that any of her constitutional rights had been violated as the result of a Wayne County policy or custom.

The threshold inquiry in any § 1983 action is whether a plaintif has been deprived of a particular right secured by the Constitution and laws of the United States. Section 1983 applies to a municipality only wheren execution of its policy or custom inflicts the injury, not where an injury is inflicted solely by its employees or agents. Single or isolated incidents of unconstitutional conduct per se are insufficient to establish a custom or policy necessary to charge a local governmental unit with liability under § 1983.

In this case, the plaintiff did not show that any specific policy or custom on the part of Wayne County was in effect that could provide the basis for her action. The only evidence of policy or custom presented strongly demonstrates that the conduct of which she complained, if it occurred, in fact violated the policy or custom in effect at the jail. The decision of the Court of Appeals should be affirmed.

138 Mich App 121; 358 NW2d 904 (1984) vacated.

Chief Justice Riley took no part in the decision of this case.

OPINION. RUSHING v WAYNE COUNTY

BEFORE THE ENTIRE BENCH (except Riley, C.J.).

BRICKLEY, J.

I.

INTRODUCTION

Plaintiff-Appellant Linda Rushing appeals from the Court of Appeals' affirmance of the trial court's grant of a directed verdict in favor of defendant-appellee Wayne County. Ms. Rushing claims that the county was liable

under 42 USC 1983 for constitutional deprivations she allegedly sustained while a pretrial detainee at the Wayne County Jail. In particular, Ms. Rushing alleged that she was detained in a seminaked state for four days and exposed to repeated observation by members of the opposite sex during her detention. We believe that a reasonable jury could have found that the failure of the county to implement appropriate safeguards to protect against such exposure, in the face of a court-ordered suicide prevention plan mandating the removal of certain inmates' garments, constituted a deliberate indifference to and moving force behind the deprivation of her constitutional rights. We therefore find that the motion should have been denied and the claim submitted to the jury. We reverse the judgment of the Court of Appeals only with respect to the portion of Ms. Rushing's municipal liability claim under 42 USC 1983 involving her allegedly unnecessary exposure to members of the opposite sex. This case is remanded to the trial court for further proceedings.

II.
FACTS AND PROCEDURAL HISTORY

A

Ms. Rushing was detained at the Wayne County Jail from June 8 to June 12, 1976. She testified regarding the following facts. She was taken to her cell by one female and two male deputies. A male deputy ordered Ms. Rushing to remove her clothes. After she removed her outer garments, she asked whether she could keep her underpants and brassiere. The male deputy insisted that she disrobe completely. After she took off her bra and handed it to the male deputy, the male deputy demanded that she remove her underpants and Ms. Rushing began to cry, whereupon she was permitted to keep this item of clothing.

The female deputy returned, again accompanied by a male, to escort Ms. Rushing to see a doctor. While she was being taken out of her cell, Ms. Rushing asked for a blanket and refused to accompany these two persons until one was provided. A jail psychologist told Ms. Rushing that she could have her clothes back. When she reentered her cell, however, the clothes had not been returned.

Ms. Rushing testified that after she had lowered her underpants to use the toilet the next morning, she noticed a custodian leaning on a broom outside her cell. The custodian stared and whistled at Ms. Rushing. Ms. Rushing stated that she then pulled up her underpants, brought her arms up to her chest and cried. Ms. Rushing testified that the custodian came by once or twice a day during her detention, leaned on his broom and stared at her.

On another occasion, two male deputies took Ms. Rushing to get epilepsy medication. She again requested, but was refused, a blanket, and was accompanied down the hall clad only in panties by the two male deputies.

Ms. Rushing further testified that a group of ten or twelve men dressed in suits paused in front of her cell, stared at her and talked among themselves, laughing. This group was accompanied by the jail psychologist who also stopped in front of Ms. Rushing's cell, looked at her, and laughed.

Ms. Beverly Wagner occupied a cell two doors down from Ms. Rushing. Ms. Wagner, who was not classified as a suicide risk and, unlike Ms. Rushing, was not generally confined to her cell all day, testified that she and other female inmates in the ward regularly walked up and down the inmates' "catwalk" directly in front of Ms. Rushing's cell. She stated that there was nothing to ob-

struct the view into the cells from the inmates' catwalk or from the deputies' catwalk, which was adjacent to and separated by bars from the inmates' catwalk. Ms. Wagner corroborated Ms. Rushing's testimony regarding the daily presence of the custodian and the presence of a group of students in front of Ms. Rushing's cell. Ms. Wagner testified that she attempted to provide covering for Ms. Rushing when males where present, lending Ms. Rushing her gown and holding a blanket in front of Ms. Rushing's cell, but that she was confined to her cell by deputies as a result of these attempts.

Three months prior to Ms. Rushing's detention, a three-judge panel of the Wayne Circuit Court issued an "Order Regarding Sheriff's Suicide Prevention Plan." [1]

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[1] With respect to the classification and treatment of potentially suicidal inmates at the jail, the order stated:

> 7. The court approves and orders implemented the following:
>
> (a) That portion of the Sheriff's plan of October 14, 1975, which provides for classification of all inmates as non-suicidal, potentially suicidal, and potentially suicidal, acute; and
>
> (b) That portion of the Sheriff's plan which provides for suicide classification recommendations to be made by psychiatric social workers and to be reviewed by a psychologist.
>
> * * *
>
> 9. In the absence of a psychiatric social worker, a nurse may classify an inmate as non-suicidal, potentiallly suicidal, or potentially suicidal, acute, and may make an appropriate cell assignment to such an inmate. A classification by a nurse with respect to suicidal propensity shall be promptly reviewed by a psychologist.
>
> 10. If there is a reasonable doubt whether an inmate should be classified as non-suicidal or potentially suicidal, the inmate shall be classified as potentially suicidal. *If there is a reasonable doubt whether an inmate*

(*concluded on page A-10*)

The jail administration devised a set of procedures regarding the classification and treatment of potentially suicidal inmates (Reception-Diagnostic Center Procedure No. 4). Procedure No. 4 was signed by Frank Wilkerson, who was employed by the sheriff's office as jail administrator and paid by Wayne County. Mr. Wilkerson, also a lawyer by training, testified that the duties of his office included the responsibility of the administration and operation of the jail, including the reception and maintenance of prisoners. He further stated that he set policies for the jail. According to Procedure No. 4, all women were placed in the women's fourth-floor annex, whereas separate wards were available for potentially suicidal male inmates. Ms. Rushing was placed in a cell in ward

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(*continued from page A-9*)

should be classified as potentially suicidal or potentially suicidal, acute, the inmate shall be classified as potentially suicidal, acute.

11. The Sheriff shall, forthwith, with the assitance of the jail psychologist, jail psychiatrist, and psychiatric social workers, prepare written criteria for classifying inmates as non-suicidal, potentially suicidal, and potentially suicidal, acute.

* * *

15. When any member of the Sheriff's staff observes an inmate who, in the judgment of the observer, clearly and obviously intends, then and there, to take his own life, the staff member shall forthwith take such steps as may appear to him in good faith to be reasonably necessary to prevent the suicide. This shall be done whether or not such inmate has been classified as potentially suicidal, or potentially suicidal, acute. *Such steps shall include removal from such an inmate of all clothing, bedding, and other articles or implements which could be used for self-destruction; provided, however, that brief underwear bottoms shall not be removed except when they have been actually used in a suicide attempt or gesture. An article so removed should not be returned to the inmate unless and until the return is ordered* by the Sheriff, Under-Sheriff, *Jail Administrator*, jail psychiatrist, jail psychologist, or jail psychiatric social worker.

411, a long row of cells in which other, nonsuicidal female inmates were housed. Ms. Rushing's cell had been "suicide proofed" in accordance with the court order. Mr. Wilkerson testified that horizontal bars had been removed from that cell in order to make it difficult, if not impossible, for inmates to tie sheeting to the bars of the cell as a way of committing suicide. According to Procedure No. 4, the jail administrator could order the return of clothing or other items to inmates who had been classified as potential suicide risks.

Although the court order vested the jail administrator with authority to overrule any decision relating to the classification of inmates according to suicidal tendency, and although the procedure authorized the administrator to return clothing to inmates who had been stripped, Mr. Wilkerson testified that decisions regarding the amount and nature of attention an inmate would receive were totally within the responsibility of the psychologist. Mr. Wilkerson testified that decisions would be left to doctors, psychiatrists, and the jail psychologist because he was reluctant to substitute his own opinions for those of people with specialized training.

With regard to jail policy regarding the exposure of naked inmates, Mr. Wilkerson testified that he could not recall ever having adopted a policy prohibiting such exposure. Mr. Wilkerson also stated that he did not know whether male janitors were present on the ward when naked women were housed there. He stated that if appropriate staff was not available, then it would be possible that a male custodian would be assigned to a female ward for a period of three or four days or even longer. He admitted that such staffing decisions were his responsibility, and also stated that it would not be an emergency for a male janitor to be sweeping a floor right in front of the cell where Ms. Rushing was housed.

Finally, Mr. Wilkerson stated that there were tours of the jail on an ongoing basis. While it was not policy to allow students to walk by areas where inmates with psychological problems were housed, Mr. Wilkerson admitted that there could be an exception where medical students are concerned. Although tours had to be approved in advance, Mr. Wilkerson stated that he would not have known who would accompany tour groups on floors where psychologically troubled people were being held.

Jail psychologist Kim, to whom Mr. Wilkerson deferred with respect to the handling of inmates, testified that Ms. Rushing was left naked during the time she was detained at the jail as a safety precaution in order to facilitate observation by jail personnel. When asked whether something could have been provided to Ms. Rushing to cover her body when other people were around, Mr. Kim opined that he did not give her a sheet or a blanket because it would be very easy for her to hang herself. Mr. Kim stated that he had experienced thousands of people being stripped since he had worked at the county jail. Mr. Kim testified that because people think about the consequences of their own actions when they have been stripped, in most cases it is good for a person to be stripped and exposed.

Mr. Wilkerson testified that protective gowns were not given to stripped inmates because the gowns could be dampened, twisted and braided in such a way that an inmate could use the gown to hang themselves. Mr. Wilkerson stated that the gown would not be provided even for the brief periods of time during which a man was on the ward, because the gown could be used for suicidal purposes. Mr. Wilkerson conceded, however, that he did not believe that the gown could be soaked and braided and used by an inmate to hang themselves if a

matron were standing in front of the person's cell while a man was in the area. In response to questioning regarding the possibility of using a gown for suicidal purposes in a cell from which all horizontal bars had been removed, Mr. Wilkerson responded that although he had no idea whether Ms. Rushing could have hanged herself on just the vertical bars, he was not going to take any chances. Mr. Wilkerson observed that there had been inmates who had been distraught enough to tie sheeting around their necks and lean forward from the vertical bars.

Ms. Rushing produced two experts at trial. Frank Donnelly, investigator for the Department of Corrections, was qualified as a correctional housing expert. He testified that ward 411, where Ms. Rushing was held, was unsuitable, given the facts related in the testimony of Ms. Rushing. In Mr. Donnelly's opinion, there was no proper purpose in housing naked inmates where they could be exposed to other people. Mr. Donnelly stated that if persons of the opposite sex had reason to come on the ward where Ms. Rushing was held, then the stripped inmate should be offered a covering of some type, such as a gown, during the periods that other persons are in the area.

Jerome Gallagher, Ph.D., Director of Mental Health Services, Correction Assessment and Treatment Services at the Ingham County Jail, also testified on behalf of Ms. Rushing. Dr. Gallagher stated that naked inmates, unlike clothed inmates, should be housed in an isolated area outside of the mainstream of activity within the jail, and he expressed the opinion that Ms. Rushing was not housed in such an isolated area. Dr. Gallagher stated that the circumstances of Ms. Rushing's detention were wrong. In his opinion there was no reason to allow a male deputy to strip a woman who was not acting violently.

Jail psychiatrist Dr. Milas Lebedevitch, who, along with Mr. Kim, was named individually in Ms. Rushing's complaint, did not appear at trial.

B

At the close of proofs, the trial court entertained and granted the county's motion for a directed verdict on the plaintiff's § 1983 claim on the ground that "the County of Wayne has not specifically been involved in any violation of the civil rights of the Plaintiff in this matter." Other claims involving individual defendants were sent to the jury. These claims included § 1983 claims against Mr. Kim and Dr. Lebedevitch alleging deliberate indifference to serious medical needs, a claim of negligence against Mr. Kim, and a claim of medical malpractice against Dr. Lebedevitch. The jury found against the plaintiff on all claims.

C

The Court of Appeals affirmed, stating, inter alia:

> Const 1963, art 7, § 6 exempts the county from liability for the sheriff's acts. . . . According to Wilkerson's testimony, the sheriff had to approve jail policy. On this basis alone, we could find the county exempt from liability under § 1983. However, at one point, Wilkerson, a county employee, also testified that he also "set policies." It is clear that defendant county cannot be held responsible under § 1983 under the doctrine of respondeat superior. Therefore, . . . it is our opinion that any intrusions upon plaintiff's privacy were not the result of a policy authorized or approved by defendant county. Furthermore, we find that the record does not reflect a "deliberate indifference" to plaintiff's constitutional right to privacy on the part of defendant county. Therefore, we hold that

> the trial court did not err in directing a verdict in favor of defendant county on this portion of plaintiff's § 1983 claim. [*Rushing* v *Wayne Co*, 138 Mich 121, 143-145; 358 NW2d 904 (1984).]

The Court of Appeals also stated:

> The plaintiff herein did not sue the sheriff, nor did she sue the jail administrator or any deputies. Therefore, even if Wilkerson should have promulgated a policy with respect to permitting males on the women's floor, but did not, we believe that defendant county could not be held liable because of Wilkerson's inaction since the failure to promulgate such a policy does not appear to us to rise to the level of deliberate indifference to the plaintiff's right to privacy. [*Id.*, p 144, n 6.]

D

We granted leave to appeal, 424 Mich 876 (1986), then vacated the earlier grant order and denied leave to appeal following oral argument. 430 Mich 867 (1988). Plaintiff's motion for reconsideration of our denial was held in abeyance pending the decision by the United States Supreme Court in *City of Canton* v *Harris*, which has since been decided, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989). We then granted leave to appeal, limited to the issue whether the trial court properly granted the county's motion for directed verdict. 433 Mich 917 (1989).

III.

MUNICIPAL LIABILITY UNDER § 1983

A

Initially, we reject the county's claim that it is shielded from § 1983 liability by Const 1963, art 7, § 6. The United States Supreme Court has repeatedly empha-

sized that state law immunities and defenses do not protect persons otherwise subject to § 1983 liability. See *Martinez* v *California*, 444 US 277, 284, n 8; 100 S Ct 553; 62 L Ed 481 (1980) ("'Conduct by persons acting under color of state law which is wrongful under 42 USC 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise . . . .'"); *Felder* v *Casey*, 487 US 131; 108 S Ct 2302; 101 L Ed 2d 123 (1988); *Owen* v *City of Independence*, 445 US 622, 647, n 30; 100 S Ct 1398; 63 L Ed 2d 673 (1980). Most recently, the United States Supreme Court in *Howlett* v *Rose*, _____ US _____; 110 S Ct 2430; 110 L Ed 2d 332 (1990), built upon *Martinez* and *Felder* in rejecting a claim that state common-law immunity could shield a person from liability under § 1983. The unanimous Court again stressed that states are not "free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." 110 L Ed 2d 358. For purposes of § 1983 liability, it is immaterial whether the state-law immunity derives from a statute as in *Martinez*, from the common law as in *Howlett*, or from a state constitutional provision as in this case. Thus, the sheriff may not maintain a state constitutional immunity defense to a claim brought under § 1983.

Additionally, we note that, as a matter of law, the policies of the sheriff and the jail administrator regarding the operation of the jail were attributable to the county. In *Marchese* v *Lucas*, 758 F2d 181, 189 (CA 6, 1985), cert den 480 US 916 (1987), the United States Court of Appeals for the Sixth Circuit rejected defendant Wayne County's argument that the county cannot be held liable for policies of the sheriff under § 1983. The court con-

cluded that "the relationship between the County and the Sheriff's Department is so close as to make the County liable for the Sheriff's failure to train and discipline his officers . . . ." See *Carroll* v *Wilkerson*, 782 F2d 44 (CA 6, 1986), cert den 479 US 923 (1986). Thus, the conclusions of the trial court and the Court of Appeals that the county could not be held liable for the sheriff's acts were erroneous.

B

In *City of Canton* v *Harris, supra*, the United States Supreme Court considered when a municipality can be held liable under § 1983 for constitutional violations resulting from its failure to train municipal employees.

The Supreme Court stated:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.
>
> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. [*Id.*, 103 L Ed 2d 427-428, emphasis added.]

In general, the program must be adequate to enable employees "to respond properly to the usual and recurring situations with which they must deal." *Id.*, 103

L Ed 2d 428. In addition, the deficiency in a municipality's training program must actually cause and be closely related to the ultimate injury.

> Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved. . . . But judge and jury, doing their respective jobs, will be adequate to the task. [*Id.*]

The Supreme Court gave a clear example of one appropriate application of the deliberate indifference standard.

> [C]ity policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be "so obvious," that the failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. [*Id.*, 103 L Ed 2d, p 427, n 10 (citation omitted).][2]

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[2] Under this standard, the Supreme Court observed that certain types of claims would not state a cause of action. These include:

1. That a particular employee was unsatisfactorily trained (because the individual employee's shortcomings may have resulted from factors other than faulty training);
2. The negligent administration of an otherwise sound program;
3. The mere showing that an injury could have been avoided if a particular officer had been better trained (since this does not call into question the adequacy of the entire program);
4. An isolated mistake on the part of an adequately trained employee. See 103 L Ed 2d 428.

IV.
APPLICATION OF THE HARRIS STANDARD

Viewing the facts developed at trial in a light most favorable to the nonmoving party,[3] we conclude that a reasonable, properly instructed jury could have found in favor of Ms. Rushing. With respect to the failure of jail policymakers to adequately train jail personnel, the jury could have found not only that policymakers failed to instruct employees in the constitutional limitations on the stripping and exposure of inmates, but also to formulate *any* policy in this regard. We further believe that the jury could have viewed this failure as a manifestation of a deliberate indifference to the sort of deprivation allegedly sustained by Ms. Rushing and that the occurrence of such a deprivation was an obvious result of this failure coupled with the recently adopted suicide prevention plan.

A

Even before the United States Supreme Court's landmark decision in *Griswold* v *Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965), it was held in the context of a § 1983 suit that a complaint alleging the unnecessary creation and distribution of nude photographs by police of a female citizen stated a claim that the woman's privacy, a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment, had been violated. *York* v *Story*, 324 F2d 450, 455 (CA 9, 1963), cert den 376 US 939 (1964). The court explained:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of stran-

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[3] *DiFranco* v *Pickard*, 427 Mich 32, 58-59; 398 NW2d 896 (1986).

> gers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if "unreasonable," is arbitrary and therefore banned under the Fourth Amendment. We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not.

In *Lee* v *Downs*, 641 F2d 1117, 1119-1120 (CA 4, 1981), the court upheld a jury verdict for a female inmate who brought a § 1983 claim alleging that she had been forced to disrobe in the presence of male guards. The court stated:

> Persons in prison must surrender many rights of privacy which most people may claim in their private homes. Much of the life in prison is communal, and many prisoners must be housed in cells with openings through which they may be seen by guards. Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.
>
> * * *
>
> Because of the conflict in the testimony, the jury was entitled to accept the plaintiff's version that she expressed a willingness to remove her underclothing if the male guards would withdraw. Viewing the case in this light, as we must, it was

> wholly unnecessary for the male guards to remain in the room and to restrain the plaintiff while her underclothing was forcefully removed. If the plaintiff was uncooperative and abusive as defendants testified and if it was impractical to assemble enough female guards to restrain the big, strong plaintiff within a reasonable time, as they also testified, there would be a different case, but the jury seems clearly to have accepted the plaintiff's version of the occurrence.

In *Cumbey* v *Meachum*, 684 F2d 712 (CA 10, 1982), the court reinstated a prisoner's claim under § 1983 for invasion of privacy. The plaintiff alleged that female guards were assigned to posts where they could view him while he undressed, showered, and used the toilet. *Id.*, p 713. Reviewing federal case law, the court observed that

> [o]ther courts have held that if guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities, or showering, the inmates' constitutional rights to privacy are being violated. [*Id.*, p 714 (citations omitted).]

The court concluded that

> the plaintiff's statement that the male inmates were subject to a "certain amount of viewing" by female guards does not necessarily fall short of a cognizable constitutional claim. The district court thus erred in dismissing the entire action as frivolous. [*Id.*]

In *Fisher* v *Washington Metropolitan Area Transit Authority*, 690 F2d 1133, 1142 (CA 4, 1982), the court held that a pretrial detainee had a "general right, constitutionally protected, not to be subjected by state action to

involuntary exposure in a state of nakedness to members of the opposite sex unless that exposure was reasonably necessary in maintaining her otherwise legal detention." See also *Forts* v *Ward*, 621 F2d 1210, 1217 (CA 2, 1980) ("The privacy interest entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex"); *Hudson* v *Goodlander*, 494 F Supp 890 (D Md, 1980) (the court found that the inmate's rights to privacy were violated by the assignment of female guards to posts where they could view him while he was completely or entirely unclothed, despite the government's argument that it was necessary to give the female guards such jobs in order to protect their right to equal employment opportunities); *Bowling* v *Enomoto*, 514 F Supp 201 (ND Cal, 1981).

Finally, in *Kent* v *Johnson*, 821 F2d 1220 (CA 6, 1987), the plaintiff brought suit under § 1983, alleging that the prison's policy of allowing female guards to view him unclothed while showering and performing bodily functions violated his Fourth and Eighth Amendment rights. The court reversed the district court's grant of summary judgment, holding that the complaint stated a constitutional claim in respect to both the Fourth and Eighth Amendments.

The defendant in the instant case does not dispute the existence of Ms. Rushing's protected liberty interest in not being exposed to members of the opposite sex. Instead, counsel has argued on appeal that under *Fisher*, *supra*, Ms. Rushing's right was not violated because it was reasonably necessary for her to be exposed in order for the jail to comply with the court-ordered suicide prevention plan.[4]

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[4] In addition, we observe that defense counsel, who represented the county as well as the individual defendants, did not object to the

(*concluded on page A-23*)

B

In *Harris*, the Supreme Court remanded the case to the Court of Appeals after concluding that the evidence in the record did not meet the deliberate-indifference standard set forth above. The plaintiff claimed that the city had inadequately trained its officers to deal with medical treatment of persons in police custody. The Supreme Court emphasized, however, that in *Harris*, the record made clear that the city did in fact train its officers and that the training included first-aid instruction. Thus, on remand the Court of Appeals was instructed to consider the city's argument that it could not have been obvious to the city that the first-aid training was insufficient to administer its constitutional written policy. *Id.*, 103 L Ed 2d 428, n 11.

By analogy to *Harris*, if a city may be said to have a policy for which it may be held liable if it fails to train employees adequately, then the outright failure to formulate any policy (which might in turn require instruction to be properly implemented) in the face of an obvious need to do so may also suffice to create liability. Otherwise, a municipality could avoid liability by simply ignoring an obvious need. This, however, was clearly not the Court's intention in *Harris*. The very notion of deliberate *indifference* contemplates a *failure* to act when the need to do so is obvious.

(*continued from page A-22*)

following instruction given with regard to the § 1983 claim against the individual defendants:

> The Plaintiff in this case had a constitutional right of privacy. There is no more basic subject to privacy than the naked body. The desire to shield one's unclothed figure from the view of strangers and particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity.

The jury could have concluded that the complete failure of policymakers to formulate a policy regarding the handling of stripped inmates manifested such a deliberate indifference to constitutional rights.[5] The jury could well have concluded on the basis of the court-ordered suicide prevention plan, as well as psychologist Kim's testimony, that policymakers knew "to a moral certainty" that many inmates would be stripped and detained unclothed in the jail. *Harris, supra*, 103 L Ed 2d 427, n 10. Thus, unless precautionary measures were taken, the violation of inmates' right not to be exposed unnecessarily to the view of other persons was certain to result. The evidence could have supported the conclusion that the failure to adequately instruct employees, and, indeed, to formulate any policy in the first instance, actually caused and was closely related to the deprivation of Ms. Rushing's constitutional rights. The jury could also have concluded that the exposure of Ms. Rushing to male deputies, while Ms. Rushing was disrobing and being escorted naked in the jail, to the male custodian, and to the group of male visitors who peered into Ms. Rushing's cell, was unnecessary and could have been prevented if, for example, the need to provide naked detainees with protective covering or to house them in an isolated area had merely been communicated to employees by jail policymakers.[6]

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[5] We find it unnecessary to determine whether and to what extent a pretrial detainee's right to bodily privacy surpasses that of a convicted prisoner, since Ms. Rushing brought forth evidence which could establish a violation of the standard which has been applied to convicted inmates.

[6] Counsel for the county urged at oral argument that no liability should flow from the county's failure to foresee that Ms. Rushing was peculiarly sensitive to being viewed while unclothed. While such sensitivity may bear on the existence or extent of damages, it has nothing to do with the existence the right not to be exposed, which is not disputed by the county, or the likelihood of the violation of such a right.

C

Finally, the Court of Appeals, in reviewing the trial court's disposition of the county's motion for directed verdict, applied an improper standard of review. The Court of Appeals appears to have undertaken independent review of the record and to have concluded that the plaintiff's proofs did not, in fact, demonstrate a deliberate indifference on the part of jail policymakers. The proper inquiry would have been whether a reasonable jury could have concluded that the deliberate indifference standard had been satisfied. *DiFranco, supra,* p 59. Applying this standard, we find that a reasonable jury, properly instructed, could have reached this conclusion.[7]

V

For the reasons set forth above, we find that the county's motion for directed verdict was improperly granted. We therefore vacate the judgments of the Wayne Circuit Court and the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion on the issue of Wayne County's liability for the violation of Ms. Rushing's constitutional rights under § 1983. We do not retain jurisdiction.

/s/ James H. Brickley
/s/ Charles L. Levin
/s/ Dennis W. Archer

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[7] We have no reason to dispute the validity of the medical treatment analysis offered by Justice Boyle. In our judgment, however, the privacy theory is much better suited to the facts of this case.

CONCURRING OPINION: RUSHING v WAYNE COUNTY

BOYLE, J. (*concurring*).

I write separately because I believe the trial court erred in granting a directed verdict in favor of defendant Wayne County with respect to plaintiff's claim that she was deprived of medical treatment while detained in the Wayne County Jail. Plaintiff's evidence has shown a policy which grants complete discretion to the psychiatric staff with regard to when or whether to review or continue treatment of a person who, having been classified as potentially suicidal, is stripped and placed in a jail cell nude except for underpants. On the basis of the evidence presented at trial, the jury could have found that this policy evinced deliberate indifference to the serious medical needs of potentially suicidal prisoners.

I

I would add to the recitation of facts in the lead opinion certain trial evidence relevant to plaintiff's claim of deprivation of medical treatment. John Nicholl, a social investigator at Wayne County Jail, testified that on June 9, 1976, he received a telephone call from plaintiff's sister indicating that plaintiff had threatened suicide. Immediately after recording this information, Nicholl took the report to the office of Dr. Lebedevitch, the jail psychiatrist. Nicholl testified that the shift commander was contacted and plaintiff was ordered stripped.

There was no evidence that plaintiff was ever seen by Dr. Lebedevitch. She was seen by You Kim, the jail psychologist, on June 9, 1976. When Kim saw plaintiff, she was nude except for underpants. Kim felt that plaintiff was suicidal and classified her as "4T," indicating "suicide potential acute" temporary. Kim ordered that plaintiff remain stripped, and indicated on his report of the

visit that he would see plaintiff the following day. However, Kim did not see plaintiff again. To the best of Kim's memory, plaintiff was subsequently seen by psychiatric social workers, and there was no reason for Kim or Dr. Lebedevitch to see her again, as she was adjusting. The jail administrator testified that if plaintiff had been seen by a psychiatric social worker, the event would have been recorded on the lieutenant logs, which indicate on an hour-by-hour basis what goes on in a given floor at the jail. However, the sheriff's department was not able to produce the lieutenant logs recording events on the floor where plaintiff was housed during her stay at the jail. Plaintiff remained nude except for underpants until sometime on June 12, 1976, when her clothes were returned to her prior to her release from the jail.

According to jail procedures for the classification and treatment of potentially suicidal prisoners, any person classified as "[p]otentially suicidal acute" "shall be immediately reviewed by the Psychiatrist or Psychologist . . . ." Reception-Diagnostic Center Procedure No. 4 (RDC 4). The procedures further required that clothing, bedding, and any other articles that could be used for self destruction be removed from prisoners who appear imminently suicidal, RDC 4, ¶ 6 (c). These procedures further provide that "[e]ach prisoner classified as potentially suicidal acute shall be reviewed daily by the Psychologist, in addition to the personal reviews of the Psychiatrist. Review by the Psychologist will be for the purpose of monitoring the progress of these prisoners, and to advise the Psychiatrist of the possibility of reclassification and relocation." RDC 4, ¶ 7 (a).

When these procedures were prepared, an original copy was forwarded to Jail Administrator Frank Wilkerson for his review and approval. The document was signed by Wilkerson, who according to his own testimony set poli-

cies for the jail. Notwithstanding the provisions regarding the continued review of "potentially suicidal acute" prisoners, the jail administrator testified that he did not and could not tell a psychiatrist or psychologist what to do with respect to an individual inmate. According to Wilkerson, it was totally within psychologist Kim's responsibility to see plaintiff when he felt it was appropriate to do so. Kim testified that thousands of people had been stripped at the jail, and that he would usually see them two to four times in a span of two to four months.[1]

Carl Recter, Deputy Director of the Reception-Diagnostic Center at Wayne County Jail, testified that the professional judgment of the psychiatrist would determine the quality or extent of the care an inmate would receive. He testified that Reception-Diagnostic Center Procedure No. 4 was intended for the center's personnel, and was not intended to give orders to the psychiatrist or psychologist.[2]

II

I concur in part III(A) of the lead opinion, holding that the county may not claim immunity to § 1983 by relying on Const 1963, art 7, § 6, and reaffirming that "the policies of the sheriff and the jail administrator regarding the operation of the jail were attributable to the county." (Slip op, p 13). Since defendant did not dispute the existence of plaintiff's protected liberty interest in not being exposed to members of the opposite sex, I concur in the analysis of the lead opinion. However, in my view the

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[1] Dr. Lebedevitch, the jail psychiatrist, did not testify at trial.

[2] There was no psychiatrist or psychologist on the staff of the Reception-Diagnostic Center. Kim was the only psychologist at the jail and Lebedevitch was the only psychiatrist.

facts of this case are more suited to a claim based on deprivation of the pretrial detainee's due process right to medical treatment.

III

A local government is subject to § 1983 liability "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury . . . ." *Monell* v *NYC Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In order for the county to be held liable for a constitutional deprivation, the county itself must cause the constitutional deprivation. Thus, the Court of Appeals correctly stated that Wayne County cannot be held liable on a respondeat superior theory. *Id.* at 691.

"[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . ." *Oklahoma City* v *Tuttle*, 471 US 808, 823; 105 S Ct 2427; 85 L Ed 2d 791 (1985). In *Pembaur* v *Cincinnati*, 475 US 469, 480-481; 106 S Ct 1292; 89 L Ed 2d 452 (1986), the Court noted that "'official policy'" often refers to formal rules or understandings — often but not always committed to writing — that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."[3] In *Pembaur*, Justice Brennan in a

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[3] The Court in *Pembaur* further held that municipal liability may be justified by a single instance of conduct if "the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers . . . ." *Id.* at 481. Although plaintiff's theory of deprivation of medical treatment does not rest on a single act — the policy of nonsupervision of the psychiatric care of stripped and suicidal inmates clearly applied to all cases and not to plaintiff only — the definition of a policymaker is relevant to this case, to determine whether the nonwritten policy articulated by Frank Wilkerson is attributable to the county.

plurality opinion further stated that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-484.

An official must be responsible for establishing final government policy before a governmental entity may be held liable for the acts of such official. *Id.* at 482-483 (plurality opinion). Final policymaking authority may be delegated, and the person to whom it is delegated may then act so as to render the governmental entity liable under § 1983. *Id.* at 483, 485. In *St Louis* v *Praprotnik*, 485 US 112, 123; 108 S Ct 915; 99 L Ed 2d 107 (1988), a plurality of the Court stated that "state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in a given area of a local government's business." The identification of policymaking officials is a question for the court. *Jett* v *Dallas Independent School Dist*, ____ US ____; 109 S Ct 2702, 2723; 105 L Ed 2d 598 (1989). In making this determination, the court should look not only to "state and local positive law," but also to "'custom and usage' having the force of law."

In *Tuttle*, *supra* at 823,, the Court stated that in order to show a policy of inadequate training, the plaintiff would have to prove "that the policymakers deliberately chose a training program which would prove inadequate." In *Canton, Ohio* v *Harris*, 489 US 378, ____; 109 S Ct 1197; 103 L Ed 2d 412, 426 (1989), the Court again considered a claim of municipal liability grounded on inadequate training of police officers and held that inadequate training could serve as a basis for § 1983 lia-

bility "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

The Court in *Canton* explained the reason for requiring a policy evincing deliberate indifference to support a claim of inadequate training:

> "This rule is most consistent with our admonition in *Monell*, 436 US at 694 . . . that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] a constitutional violation.' Only were [sic] a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." 103 L Ed 2d 426-427.

Several of the federal circuits, in cases predating *Canton*, have recognized a governmental policy by virtue of the failure of governmental policymakers to establish rules or procedures where rules are called for. "[I]n situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable." *Jones* v *Chicago*, 787 F2d 200, 204 (CA 4, 1986). In *Mairena* v *Foti*, 816 F2d 1061, 1065 (CA 5, 1987), cert den 484 US 1005 (1988), the court concluded that "failure to establish policies to protect material witnesses from wrongful arrest and incarceration was the result of callous indifference and not mere negligence." See also *Fiacco* v *City of Rensselaer*, 783 F2d 319, 326 (CA 2, 1986) cert den 480 US 922 (1987) (the city's failure to use reasonable care in investigating claims of police brutality demonstrated a policy of deliberate indifference to the constitutional rights of persons within the city's domain).

IV

The Due Process Clause of the Fourteenth Amendment requires the government to provide needed medical treatment to a pretrial detainee. *Revere* v *Massachusetts General Hosp*, 463 US 239, 244; 103 S Ct 2979; 77 L Ed 2d 605 (1983). The Due Process protections afforded a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner."[4] In *Estelle* v *Gamble*, 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 (1976), the United States Supreme Court concluded that "deliberate indifference to serious medical needs of prisoners" would violate the Eighth Amendment proscription against cruel and unusual punishment.

Several of the federal circuits, when considering the standard of medical care constitutionally guaranteed a pretrial detainee, have applied the standard of deliberate indifference to a serious medical need. See *Boring* v *Kozakiewicz*, 833 F2d 468 (CA 3, 1987) cert den 485 US 991 (1988); *Whisenaut* v *Yuam*, 739 F2d 160 (CA 4, 1984); *Jones* v *Johnson*, 781 F2d 769 (CA 9, 1986); *Garcia* v *Salt Lake Co*, 768 F2d 303 (CA 10, 1985); *Hamm* v *DeKalb Co*, 774 F2d 1567 (CA 11, 1985), cert den 475 US 1076 (1986). In *Hamm*, the United States Court of Ap-

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[4] While the United States Supreme Court has held that the protections of the Due Process Clause are not triggered by mere negligence of prison officials, *Daniels* v *Williams*, 474 US 327; 106 S Ct 662; 88 L Ed 2d 662 (1986), *Davidson* v *Cannon*, 474 US 344; 106 S Ct 668; 88 L Ed 2d 677 (1986), it has not settled the question whether an intent less than deliberate indifference may deprive a pretrial detainee of due process. In *Canton, Ohio* v *Harris*, *supra*, 103 L Ed 2d 426, n 8, the Supreme Court noted that it had in *Revere* "reserved decision on the question of whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody." The Court in *Canton* again declined to settle the definition of the due process rights of a pretrial detainee to medical treatment

peals for the Eleventh Circuit noted that many jails house convicted prisoners as well as pretrial detainees, so that a different standard of constitutional guarantees for these two groups would result in the courts becoming "'enmeshed in the minutiae of prison operations' . . . ." *Id.* at 1574. See also *Boring, supra* at 472. The Seventh Circuit Court of Appeals has defined a greater protection for pretrial detainees, holding that the due process right of a pretrial detainee is violated when a jailer "fails to promptly and reasonably procure competent medical aid for a pretrial detainee who suffers a serious illness or injury while confined." *Matzker* v *Herr,* 748 F2d 1142, 1147 (CA 7, 1984). Finally, the Fifth and Eighth Circuits recognize a duty to provide pretrial detainees *at a minimum* the level of medical care required for convicted prisoners under the Eighth Amendment, *Partridge* v *Two Unknown Police Officers,* 791 F2d 1182 (CA 5, 1986); *Boswell* v *Sherburne Co.* 849 F2d 1117 (CA 8, 1988), cert den 488 US 1010 (1989), without deciding whether greater protections may be provided under the Due Process Clause of the Fourteenth Amendment.

It is not necessary in this case to define the exact parameters of a pretrial detainee's right to medical treatment. This is because under § 1983 jurisprudence the county's policy of nonsupervision of psychiatric and psychological personnel must itself evince deliberate indifference in order to subject the county to liability. *Canton, supra.* Because a showing of deliberate indifference is required by the standard for county liability, we need not decide whether some lesser level of intent would have been sufficient to hold an individual official liable for a deprivation of medical care guaranteed plaintiff by the Fourteenth Amendment.

V

I would find that the jail administrator is the final policymaker for Wayne County with respect to the Wayne County Jail. The sheriff, as law enforcement arm of the county, makes policy in police matters. *Marchese* v *Lucas*, 758 F2d 181 (CA 6, 1985), cert den 480 US 916 (1987); Const 1963, art 7, § 4. See also *Police Officers* v *Wayne Co*, 93 Mich App 76, 82; 286 NW2d 242 (1979). While it might be argued that the sheriff retained ultimate decisionmaking authority over the jail, I would find, on the basis of the evidence presented at trial, that such authority was delegated to Frank Wilkerson.[5] The jail administrator's own testimony indicated that he set policies for the jail. The truth of that assertion is illustrated by the fact that the jail procedures (Reception-Diagnostic Center Procedure No. 4) were sent to Wilkerson for his approval and, when distributed, were signed by Wilkerson.

There was ample evidence from which the jury could have concluded that it was the policy of Wayne County to cede total discretion regarding the psychiatric treatment of stripped inmates to the jail psychiatrist or psychologist. The existence of such a policy is apparent in the testimony of the Jail Administrator. Wilkerson's testimony that he would never question a psychiatrist's exercise of discretion itself illustrates a policy of

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[5] I would find no merit in plaintiff's claim that Dr. Lebedevitch and psychologist Kim were policymakers whose acts could, by virtue of that status, render the county liable under § 1983. While Lebedevitch and Kim were granted complete discretion in their treatment of suicidal and stripped prisoners, it was not they who adopted the *policy* of complete discretion. The distinction between discretion vested in a government official and final policymaking authority is discussed in Justice Brennan's (plurality) opinion in *Pembaur*:

> "The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." 475 US 481-482.

nonsupervision of jail psychiatric staff. Nor can I conclude as a matter of law that the chosen policy is a matter of mere negligence or default. The need for review of potentially acutely suicidal prisoners for monitoring and possible reclassification was known. Wilkerson himself reviewed and approved jail procedures which required daily review by a psychologist of persons classified as potentially suicidal, acute. The choice to delegate complete discretion to the psychiatric staff with regard to whether and when to review persons classified as potentially suicidal, acute, and stripped, thus constitutes "a course of action consciously chosen from among various alternatives," *Tuttle*, at 823.

I would hold, by analogy to *Canton*, that a policy of placing total discretion in prison psychiatric personnel, or put another way, a policy of complete nonsupervision of such personnel, is actionable under § 1983 if it constitutes deliberate indifference to the rights of individuals with whom those personnel come in contact. *Canton*, 103 L Ed 2d 426. If inadequate training may constitute deliberate indifference, then the failure of a policymaker to enforce proper procedures, in effect creating a policy of total discretion in the prison psychiatric personnel, likewise may evince deliberate indifference to the constitutional rights of prisoners.

The question thus becomes whether the policy of granting total discretion to the psychiatric staff regarding when or whether to review and monitor a suicidal and stripped inmate demonstrated deliberate indifference to the serious medical needs of the stripped and suicidal inmate. A jury could well conclude that in the circumstances existing in this case, a rule of total discretion constitutes deliberate indifference to the serious medical needs of persons stripped for suicide prevention.

Several circuits have recognized that the need for psychiatric treatment may constitute a serious medical need. "A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills." *Partridge* v *Two Unknown Police Officers, supra* at 1187; *Inmates of Allegheny Co Jail* v *Pierce*, 612 F2d 754, 763 (CA 3, 1979). *Roberts* v *Troy*, 773 F2d 720, 724 (CA 6, 1985). A factfinder could reasonably conclude that a suicidal woman who is stripped nude except for underpants and placed in a jail cell has a serious medical need for continued psychiatric review and monitoring.

Moreover, there is evidence from which a jury could conclude that the policy of granting total discretion to the psychiatric staff with regard to the treatment of stripped and suicidal patients represents deliberate indifference on the part of the Jail Administrator. As previously noted, having reviewed and approved jail procedures calling for a daily review by a psychiatrist of persons classified as potentially acutely suicidal, the administrator was aware of the need for such review, for purposes of monitoring as well as possible reclassification. The policy, whether it is characterized as one of nonenforcement of written procedures, of nonsupervision of psychiatric personnel, or of complete delegation of discretion to psychiatric personnel, under the circumstances may be found to be a policy of deliberate indifference.

CONCLUSION

I would remand for retrial on plaintiff's theory that defendant Wayne County's policy of ceding total discretion regarding the treatment and review of suicidal and stripped inmates evinced deliberate indifference to the serious medical needs of plaintiff.

/s/ Patricia J. Boyle

DISSENTING OPINION: RUSHING v WAYNE COUNTY

GRIFFIN, J. (*dissenting*).

Respectfully, I dissent. The trial court properly granted a directed verdict in favor of defendant Wayne County because plaintiff failed to establish a prima facie showing that any of her constitutional rights were violated as the result of a Wayne County policy or custom.

I

The threshold inquiry in any 42 USC 1983 action is whether the plaintiff has been deprived of a particular right secured by the Constitution and laws of the United States. *Martinez* v *California*, 444 US 277; 100 S Ct 553; 62 L Ed 2d 481 (1980), reh den 445 US 920 (1980).[1] Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham* v *Connor*, 490 US ____, ____; 109 S Ct 1865; 104 L Ed 2d 443, 453-454 (1989), quoting *Baker* v *McCollan*, 443 US 137, 144, n 3; 99 S Ct 2689; 61 L Ed 2d 433 (1979).

It is true that some federal courts have assumed that inmates and detainees have a constitutional right to privacy;[2] however, the United States Supreme Court has

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[1] Although it is true, as the lead opinion points out, that defendant did not press the argument that Rushing lacked a protected liberty interest, a constitutional right cannot be created by concession. *Magreta* v *Ambassador Steel Co*, 378 Mich 689, 705; 148 NW2d 767 (1967) (a court is not bound by concessions of counsel on questions of law). See also 73 Am Jur 2d, Stipulations, § 5, p 539.

[2] In one case cited by the lead opinion, *Fisher* v *Washington Metropolitan Area Transit Authority*, 690 F2d 1133 (CA 4, 1982), the court cites *Lee* v *Downs*, 641 F2d 1117 (CA 4, 1981), for authority that inmates have a constitutional right to privacy. However, the court in *Fisher* noted that the source of such a constitutional right was not identified in *Lee*.

neither formally acknowledged such a right nor explored its contours.[3] Indeed, the Supreme Court has cautioned that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . ." *Price* v *Johnston*, 334 US 266, 285; 68 S Ct 1049; 92 L Ed 1356 (1948). One federal court, while recognizing such a right, has conceded that "[o]ne of the most important rights which is necessarily limited as a result of one's incarceration is the right to be free of unwanted intrusions into one's personal privacy." *Smith* v *Fairman*, 678 F2d 52, 54 (CA 7, 1982) cert den 461 US 907 (1983).

In *Bell* v *Wolfish*, 441 US 520, 537; 99 S Ct 1861; 60 L Ed 2d 447 (1979), the United States Supreme Court explained that a detainee's rights may be restricted for less than compelling reasons. "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. *Loss of freedom of choice and pri-*

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[3] In *Bell* v *Wolfish*, 441 US 520, 99 S Ct 1861; 60 L Ed 2d 447 (1979), the United States Supreme Court merely *assumed*, without deciding, that pretrial detainees have a constitutional right to privacy. Moreover, the federal courts which hold that inmates and detainees have a constitutional privacy right are in disarray as to what does and does not constitute a violation of the right. See, e.g., *Smith* v *Fairman*, 678 F2d 52 (CA 7, 1982), cert den 461 US 907 (1983) (limited frisk searches of males by female guards does not violate the constitutional right of privacy); *Davis* v *Butcher*, 853 F2d 718 (CA 9, 1988) (an inmate's constitutional right of privacy was not violated when the state corrections officer exhibited nude photographs of the inmate's wife to other inmates and made derogatory remarks to the desk sergeant regarding his wife's anatomy); *Bagley* v *Watson*, 579 F Supp 1099 (D Or, 1983) (clothed pat-down frisk searches and visual observation of male inmates by female guards does not violate an inmates' right to privacy); *Hodges* v *Klein*, 412 F Supp 896 (D NJ, 1976) (requiring anal inspections of an inmate when entering or leaving an institution or following visits with friends or relatives does not violate the inmate's right to privacy). Cf. *Woods* v *White*, 689 F Supp 874 (D Wis, 1988) (an inmate infected with aids has a constitutional right to privacy with respect to his medical records).

vacy are inherent incidents of confinement in such a facility. A detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546. "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* Moreover, the Court stated,

> "[t]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . . 'Such considerations are peculiarly within the province and professional expertise of corrections officials, and, *in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.*'" *Id.* at 547, quoting *Pell* v *Procunier,* 417 US 817, 827; 94 S Ct 2800, 41 L Ed 2d 495 (1974) (emphasis added).

II

Whether Wayne County can be held liable under § 1983 on the record in this case must be determined against the backdrop of a substantial body of § 1983 jurisprudence. In the leading case of *Monell* v *Dep't of Social Services of New York City,* 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the United States Supreme Court ruled that § 1983 applies to a municipality only when "execution of a government's policy or

custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." The Court expressly rejected local governmental liability based on respondeat superior. The Court stated: "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.*

Because of the importance of distinguishing between direct and vicarious liability, the United States Supreme Court has required proof of a direct causal connection between a governmental policy and the alleged constitutional deprivation. See, e.g., *Oklahoma City* v *Tuttle*, 471 US 808, 824-825, n 8; 105 S Ct 2427; 85 L Ed 2d 791 (1985) (requiring an "affirmative link" between municipal policy and the constitutional violation); *Polk Co* v *Dodson*, 454 US 312; 102 S Ct 445; 70 L Ed 2d 509 (1981) (the municipal policy must be a "moving force" behind constitutional deprivation). As Justice O'Conner has explained:

> "In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to some municipal policy. Finding § 1983's causation requirement satisfied by such a remote connection, however, would eviscerate *Monell's* distinction . . . between vicarious liability and liability predicated on the municipality's *own* constitutional violations. The limits on municipal liability imposed by § 1983 require more careful analysis, in each instance, of the municipal policy alleged in the case, and whether a jury reasonably could conclude that the city's conduct was the moving force in bringing about the constitutional violation." *Springfield* v *Kibbe*, 480 US 257, 267-268; 107 S Ct 1114; 94 L Ed 2d 293 (1987) (O'Conner, J., dissenting). (Emphasis in original.)

It is incumbent upon a § 1983 plaintiff to point to a particular policy or custom of the local government unit and to establish that the policy or custom has directly deprived the plaintiff of a specific constitutional right. To apply § 1983 to a municipality when the proofs show only that one of its employees has engaged in unconstitutional conduct would amount to the imposition of vicarious liability in violation of *Monell's* instruction.

To be sure, courts have not limited § 1983 application to those municipal policies or customs which have been established by resolution or ordinance. But in the absence of such formal action, courts have required § 1983 plaintiffs to prove at least a pattern of violations from which it may be inferred that the conduct implements the municipality's policy or custom. See, e.g., *Fiacco* v *City of Rensselaer*, 783 F2d 319 (CA 2, 1986), cert den 480 US 922 (1987) (multiple incidents are required for the finding of a policy or custom evincing deliberate indifference); *Patzner* v *Burkett*, 779 F2d 1363 (CA 8, 1985) (a municipality may be liable if it has notice of prior misbehavior); *Rodgers* v *Lincoln Towing Service, Inc*, 771 F2d 194 (CA 7, 1985) (one intimidating phone call by the police department does not constitute a policy or custom); *Languirand* v *Hayden*, 717 F2d 220, 227 (CA 5, 1983), cert den 467 US 1215 (1984) (a municipal liability for failure to train requires "evidence at least of a pattern of similar incidents"); *Wellington* v *Daniels*, 717 F2d 932 (CA 4, 1983) (a failure to supervise only gives rise to § 1983 liability where there is a history of widespread abuse); *Turpin* v *Mailet*, 619 F2d 196 (CA 2, 1980), cert den 449 US 1016 (1980) (mere evidence that the police board of commissioners failed to discipline an officer in connection with a prior incident is insufficient to establish a pat-

tern of harassment); *Reed* v *Schneider*, 612 F Supp 216 (ED NY, 1985) (one incident, although perhaps a constitutional violation, is insufficient to establish a municipal policy or custom); *Giarrusso* v *Chicago*, 539 F Supp 690 (ND Ill, 1982) (a mere conclusory allegation of the deprivation of a constitutional right on the basis of single unconstitutional act is insufficient to impose municipal liability).

The principle which clearly emerges is that single or isolated incidents of unconstitutional conduct per se are insufficient to establish a custom or policy necessary to charge a local governmental unit with § 1983 liability.

The facts of this case are remarkably similar to facts encountered by the United States Court of Appeals for the Fourth Circuit in *Fisher* v *Washington Metropolitan Area Transit Authority*, 690 F2d 1133 (CA 4, 1982). There, a pretrial detainee brought a § 1983 suit against the sheriff in charge of a county facility in which she was detained. Asserting deprivation of her constitutional right of privacy, the plaintiff complained that she was placed in a cell adapted for suicidal inmates and detainees in a section which also housed males. Because she was considered to be suicidal, all clothing, except her underpants, was taken away. It was her testimony that male deputies outside her cell made derogatory remarks concerning her appearance.

On appeal from a directed verdict for the sheriff, the court recognized that a pretrial detainee enjoys a

> "general right, constitutionally protected, not to be subjected by state action to involuntary exposure in a state of nakedness to members of the opposite sex unless that exposure was reasonably necessary in maintaining her otherwise legal detention." *Id.* at 1142.

Nevertheless, the court affirmed the directed verdict, ruling:

> "Only if the evidence showed that conduct directly causing the deprivation was done to effectuate an official policy or custom for which [the sheriff] was responsible could he be held liable. . . . The evidence would not support such a finding.
>
> "This is obvious when attention is focused on the specific deprivation charged. It is not . . . that [the plaintiff] was placed in a detention cell with her clothes removed following her feigned suicide attempt. This might well have been done in effectuation of a general policy respecting the treatment of such detainees for which [the sheriff] was responsible. Indeed, his own testimony probably established a willing acceptance of responsibility for such a policy. But the deprivation charged here was more narrowly the exposure to male viewing that was alleged then to have ensued. There is nothing in the evidence either directly or indirectly supporting any determination that such an exposure was also in keeping with established policy or developed custom chargeable to [the sheriff]. Instead, all the evidence on the point was to the contrary: that the policy was to protect a detainee such as [the plaintiff] whose clothing had been removed under these circumstances from indiscriminate viewing by any but female custodians. *That this policy may have been violated on this occasion by unauthorized subordinate conduct — or by sheer accident beyond the control of any official — cannot be charged to [the sheriff] under developed § 1983 doctrine. . . . For this reason,*

> *the district court did not err in directing a verdict in favor of the defendant . . . on this federal claim.*" *Id.* at 1143. (Emphasis added.)

In the case before us, the claim of this plaintiff is not based on the fact that she was placed in a women's ward in a cell without clothing except for her underpants. The precaution of removing her clothing was taken upon order of the jail psychologist after plaintiff's sister called and warned that plaintiff had threatened suicide. Following an examination, the psychologist found plaintiff to be potentially suicidal.[4]

Plaintiff contends in her brief in this Court that she is entitled to § 1983 relief because Wayne County "through institutional policies, customs and high official decisions allowed the Plaintiff to be viewed by men and other prisoners without any justification." Specifically, plaintiff asserts that her right of privacy was abridged because (1) a male deputy was among those present when her clothing, except underpants, was taken from her; (2) a male janitor stood in front of her cell on several occasions; and (3) a group of medical students, which included males, toured the facility and walked past her cell.

Under § 1983 jurisprudence, plaintiff may succeed in imposing liability on Wayne County only if she has shown that it was the policy or custom of Wayne County to permit such acts. However, this record is utterly devoid of any evidence that Wayne County had such a policy or custom, that it had knowledge of such

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[4] As the lead opinion has explained, three months prior to plaintiff's detention, a three-judge panel of the Wayne Circuit Court had issued an order requiring removal from potentially suicidal inmates of all clothing, except brief underwear bottoms. See Slip op, pp 4-5, n 1.

acts, that it encouraged such acts, that it permitted such acts, or that there was a prior pattern of such acts.

III

The lead opinion leans heavily on *City of Canton* v *Harris*, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989), wherein the United States Supreme Court recently said that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contact." *Id.*, 103 L Ed 2d 426.

The Court made clear that "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a city be held liable for such a failure under § 1983." *Id.*, 103 L Ed 2d 427. Further, the Court cautioned that, standing alone, a local governmental unit is not automatically liable under § 1983 if one of its employees happens "to apply the policy in an unconstitutional manner, for liability would then rest on respondeat superior." *Id.*, 103 L Ed 2d 425.

In her instructive concurring opinion, Justice O'Conner pointed to circumstances where failure to train might constitute a policy or custom sufficient to impose municipal liability. First, she stated:

> "Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on *actual or constructive notice* that the particular omission is substantially certain to result in the violation of constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made '"a deliberate choice to follow a course

> of action . . . from among various alternatives."' *Id.*, 103 L Ed 2d 431 (O'Conner, J., concurring in part and dissenting in part, citations omitted, emphasis added).

It cannot be said that Wayne County had actual or constructive notice prior to plaintiff's incarceration in 1976 of the constitutional privacy right which plaintiff now claims. The lead opinion asserts, upon the basis of its view of the record, that "the jury could have found not only that policymakers failed to instruct employees in the constitutional limitations on the stripping and exposure of inmates, but also to formulate *any* policy in this regard." Slip op, p 15. For support, the lead opinion cites several federal court decisions;[5] however, it is significant that each of those cases which addressed an inmate's or detainee's alleged right of privacy was decided *after* the period during which plaintiff was housed at the Wayne County Jail.[6] Since such a constitutional right was not widely recognized prior to 1976, it cannot be said that Wayne County had actual or constructive

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[5] While these cases can be read for the broad proposition that inmates have a general constitutional right of privacy, the recognition of such a right is not universal. See, e.g., *Bagley* v *Watson*, 579 F Supp 1099 (D Or, 1983) (noting that since the United States Supreme Court in *Bell* v *Wolfish*, *supra*, had held that body cavity searches of detainees were constitutional, clothed pat-down frisk searches and visual observation of males by female guards were constitutional); *Griffin* v *Dep't of Corrections*, 654 F Supp 690 (ED Mich, 1982) (inmates did not possess protected privacy rights under the federal constitution against being viewed while naked by correctional officers of the opposite sex); *Chapman* v *Rhodes*, 434 F Supp 1007 (SD Ohio, 1977), rev'd on other grounds 452 US 337; 101 S Ct 2392, 69 L Ed 2d 59 (1981) (convicted maximum security inmates have no constitutional right of privacy).

[6] The lead opinion cites only one case, *York*, *supra*, decided prior to plaintiff's detention. However, *York* dealt with the privacy rights of a private citizen rather than the rights of an inmate or detainee.

knowledge that the conduct alleged would violate a constitutional right of detainees such as plaintiff.[7]

Justice O'Conner further noted in *Canton:*

> "The claim in this case — that police officers were inadequately trained in diagnosing the symptoms of emotional illness — falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city. As the Court's opinion observes, . . . *this Court has not yet addressed the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees* who have been *physically* injured while being apprehended by the police. . . . *There are thus no clear constitutional guideposts* for municipalities in this area . . . ." *Id.*, 103 L Ed 2d 432 (O'Conner, J., concurring in part and dissenting in part, emphasis added).

Similarly the United States Supreme Court has not yet formally recognized an inmate or detainee's constitutional right of privacy or examined the precise nature of the obligation that the Due Process Clause or any other constitutional provision may impose upon local governments with respect to the privacy of inmates and detainees. Such a right had not been recognized by this

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[7] Indeed, the United States Court of Appeals for the Fifth Circuit noted in 1978, two years after plaintiff was detained at the Wayne County Jail, that the United States Supreme Court had provided little specific guidance in defining privacy rights. *Plante* v *Gonzalez*, 575 F2d 1119, 1134 (CA 5, 1978), cert den 439 US 1129 (1979).

Court, nor had it been recognized by the vast majority of federal courts at the time that this plaintiff was detained in the Wayne County Jail. Thus, at the time of plaintiff's detention, there were no "clear constitutional guideposts" requiring the county to train its employees in the manner that the lead opinion, with keen hindsight, now suggests they should have been trained.[8]

Justice O'Conner also indicated that failure to train might amount to a custom or policy where

> "it can be shown that policymakers were aware of, and acquiesced in, *a pattern of constitutional violations* involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of

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[8] It should not be overlooked that plaintiff did not raise the issue of defendant's failure to train jail personnel either in the trial court or the Court of Appeals. Plaintiff presented no evidence, whatsoever, that defendant either inadequately trained or altogether failed to train its employees. Although plaintiff's original complaint was filed in 1977, an amended complaint was filed in 1981, the same year in which the trial occurred. By 1981, several federal courts had accepted the theory that § 1983 liability could be predicated upon a failure to train. Therefore, liability based upon a failure to train was not unknown or unrecognized at the time *Rushing* came to trial. See, e.g., *Reeves* v *City of Jackson*, 608 F2d 644 (CA 5, 1979); *Owens* v *Haas*, 601 F2d 1242, 1246 (CA 2, 1979); *McClelland* v *Facteau*, 610 F2d 693 (CA 10, 1979); *Burton* v *Waller*, 502 F2d 1261, 1285 (CA 5, 1974), cert den 420 US 964 (1975); *Beverly* v *Morris*, 470 F2d 1356 (CA 5, 1972); *Carter* v *Carlson*, 447 F2d 358, 365 (CA DC, 1971), rev'd on other grounds sub nom *District of Columbia* v *Carter*, 409 US 418; 93 S Ct 602; 34 L Ed 2d 613 (1973); *Popow* v *City of Margate*, 476 F Supp 1237, 1246 (D NJ, 1979); *Leite* v *Providence*, 463 F Supp 585, 590-591 (D RI, 1978).

In the past, this Court has been reluctant to review questions not pressed and passed upon in the lower courts. See, e.g., *Poelman* v *Payne*, 332 Mich 597, 605; 52 NW2d 229 (1952), and cases cited therein. Due to plaintiff's failure to pursue a theory of liability predicated upon Wayne County's failure to train, this Court is, in effect, saying to plaintiff "here, you missed a potential theory of liability — have another go at it."

> constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements." *Id.*, 103 L Ed 2d p 432, (O'Conner, J., concurring in part and dissenting in part, emphasis added).

Under this analysis, again, plaintiff must demonstrate a "pattern of violations from which a kind of 'tacit authorization' by [county] policymakers can be inferred." *Id.* As already noted, the record is devoid of any evidence of a pattern of violations from which it might be inferred that Wayne County was aware of and acquiesced in the conduct about which plaintiff complains.

IV

Plaintiff's complaint does not allege, and the proofs do not show, that any specific policy or custom on the part of Wayne County was in effect which could provide the basis for her § 1983 action. Furthermore, plaintiff has not alleged or proven that there was inadequate training of personnel at the Wayne County Jail prior to plaintiff's incarceration. Indeed, the only evidence of policy or custom presented at trial strongly demonstrates that the conduct of which plaintiff complains, if it occurred, in fact violated the policy or custom then in effect at the jail.

While conceding that there was no written policy, Wayne County Jail Administrator Frank Wilkerson testified that it was the custom at the jail to have female employees handle female inmates. He stated that it was not normal, nor was it regular or ordinary, for a male janitor to be on the fourth floor while females were unclothed. While admitting that staff shortages

might necessitate the presence of a male janitor, Wilkerson's testimony was that he insisted upon a matron announcing to inmates the impending presence of a male and accompanying any male onto the floor.

Wilkerson's testimony was corroborated by Sergeant M.A. Clipper, a female who was the command officer of her shift in the women's division in Ward 411 for more than eighteen years. Moreover, Sgt. Clipper testified that she worked the day shift between June 8 and June 12, 1976, the days which plaintiff was housed at the Wayne County Jail. Sgt. Clipper testified that, in her experience, males were not allowed in Ward 411. The only exceptions were maintenance and medical personnel. Sgt. Clipper said that the routine or habit at the jail in regard to males coming on the floor included (1) an announcement to the inmates that males are entering the ward, (2) a female member of Sgt. Clipper's staff accompanying the male onto the ward, and (3) the staff member proceeding the male to make sure everything was all right. She further testified that although male janitors were permitted on the ward, it was standard practice to announce their presence and to accompany them whenever possible. Sgt. Clipper also testified that it would have been a departure from practice and custom at the Wayne County Jail for a male deputy to be present when clothing was removed from a female inmate.

Wilkerson testified that while student tours of the women's floor were allowed, it was policy that such a group was not permitted to walk by a cell where an unclothed female was housed. He testified that all such tours were required to be approved by him, that he kept records of such tours, and that he searched his records and found no record of a tour during the days when

plaintiff was in the Wayne County Jail. Wilkerson's testimony concerning such tours was corroborated by Sgt. Clipper.

Of course, it is recognized that the posture of this case is such that the evidence must be viewed in a light most favorable to plaintiff. Nevertheless, such a standard should not blind us to the fact that the only evidence relating to policy or custom presented in this case supports the conclusion that it was the policy or custom of the jail to prevent the very acts of which this plaintiff complains. Indeed, if the acts occurred, they violated the policy and custom then in place at the jail.

V

In *City of Canton, supra*, the Supreme Court stated:

> "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . *It may be, for example, that an otherwise sound program has occasionally been negligently administered.*" *Id.*, 103 L Ed 2d, p 428 (emphasis added, citations omitted).

The evidence in this case, viewed in a light most favorable to plaintiff, reveals several egregious but isolated incidents. The record indicates, at worst, that on this particular occasion a sound program was negligently administered. Under the analysis provided by *City of Canton*, this is not sufficient to impose § 1983 liability on Wayne County. Accordingly, I would affirm the decision of the Court of Appeals.

/s/ Robert P. Griffin
/s/ Michael F. Cavanagh

ORDER GRANTING RECONSIDERATION

(State of Michigan — Supreme Court)

(Reconsideration Granted December 26, 1989)

(RUSHING v WAYNE COUNTY, No. 74724, 1/November 1986)

Following affirmance of the judgment of the circuit court by the Court of Appeals, 138 Mich App 121 (1984), the Supreme Court granted leave to appeal, 424 Mich 876 (1986), then vacated the earlier grant order and denied leave to appeal following oral argument, 430 Mich 867 (1988). The order of March 29, 1988 denying leave to apeal following oral argument is vacated, and the case is to be reargued and resubmitted, limited to the issue whether the trial judge correctly granted defendant county's motion for a directed verdict on the question of defendant's municipal liability under 42 USC 1983 in light of *City of Canton* v *Harris*, 489 US — (1989). The parties are to submit supplemental briefs limited to the above-stated issue. Interested persons or groups are invited to file briefs amici curiae with the Court. Reported below: 138 Mich App 121.

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Leave to Appeal Denied March 29, 1988)

(RUSHING v WAYNE COUNTY, No. 74724)

The cause having been briefed and orally argued, the order of February 5, 1986, 424 Michh 876, is vacated, and leave to appeal is denied because the Court is no longer persuaded that it should review the questions presented. Reported below: 138 Mich App 121.

LEVIN and ARCHER, JJ., are of the opinion that the Court should decide by written opinion the questions presented in the briefs filed by the appellant and the appellees.

ORDER GRANTING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Certified February 5, 1986)

(LINDA HARTLEY RUSHING, Plaintiff-Appellant, v COUNTY OF WAYNE (Wayne County Sheriff's Department), YOU KIM and MILAS LEBEDEVITCH, Jointly and Severally, Defendants-Appellees — SC: 74724; COA: 61678 [138 MA 121]; LC: 77-724529 NZ)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of February in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable: G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is GRANTED. It is further ORDERED that this case be argued and submitted to the Court together with the cases of *Hadfield* v *Oakland County Drain Commissioner* (Docket No. 75494), *Veeneman* v *State of Michigan* (Docket No. 76815), and *Landry* v *City of Detroit* (Docket No. 77011), one immediately following the other, at such future session of the Court as the cases are ready for submission.

Riley, J., not participating.

(*Certification Omitted*)

OPINION

(State of Michigan — Court of Appeals)

(Filed June 10, 1984)

(LINDA HARTLEY RUSHING, Plaintiff-Appellant, v COUNTY OF WAYNE (WAYNE COUNTY SHERIFF'S DEPARTMENT), YOU KIM And MILAS LEBEDEVITCH, Jointly And Severally, Defendants-Appellees — Docket #61678)

BEFORE: V.J. Brennan, P.J.,
and W.P. Cynar and C.W. Simon, Jr.,* JJ.

PER CURIAM

Plaintiff appeals by right from a jury verdict in favor of all defendants and a partial directed verdict in favor of defendant, county, in which plaintiff's intentional tort and § 1983 claims were dismissed.

In her amended complaint, plaintiff alleged that while she was detained in the Wayne County Jail, on the charge of obstruction of justice, defendants Kim and Lebedevitch, while acting in their positions of authority as employees of Wayne County, forced her to remain disrobed in her cell for several days, "unclothed except for underclothing." Furthermore, plaintiff alleged that defendants denied plaintiff her customary dosage of medication for her epileptic condition while she was confined in jail. Plaintiff brought this action claiming that by their conduct, defendants Kim, a psychologist and Lebedevitch, a psychiatrist, intentionally inflicted emotional distress upon her.

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* Circuit judge sitting on the court of Appeals by assignment.

In addition, plaintiff alleged that while she was unclothed and in her cell, she was viewed by several male employees of the Wayne County Sheriff's Department, and that defendant Wayne County had also intentionally inflicted emotional harm. In count II of her complaint, plaintiff alleged a violation of 42 USC § 1983, and claimed that defendants' conduct violated her constitutional rights, including the protected right of privacy. In a "clarified" second amended complaint, plaintiff alleged a violation by defendant Wayne County of the "building defect" exception to the governmental immunity statute. MCL 691.1406; MSA 3.996(106).

At the time of plaintiff's detainment, the Wayne County Jail was subject to a circuit court order which required the jail staff to remove clothing from an inmate who exhibited suicidal tendencies. The order further provided that when clothing is so removed, "the advice of persons with psychiatric training must be promptly sought respecting the return of some or all of such articles and implements."

Plaintiff was incarcerated in the Wayne County Jail from June 8 to June 12, 1976. At trial, John Nicholl, a social investigator whose duties included processing and counseling inmates at the jail, testified that he was employed by defendant county. On June 9, 1976, he received a telephone call from a person purporting to be plaintiff's sister who informed him that plaintiff threatened suicide. Nicholl relayed this information to the women's floor housing plaintiff, the doctor's office, and defendants Lebedevitch and Kim.

Defendant Kim testified that his main duties involved the diagnostic evaluation of the mentally ill and/or suicidal individuals. After Nicholl informed Kim about the phone call, Kim ordered plaintiff to be stripped of all clothing except her panties (pursuant to the court order).

He then went to the wing where plaintiff was housed to examine her to determine if plaintiff was suicidal. Kim spoke with plaintiff through the bars of her cell and at the time, plaintiff was nude except for her panties. Although he did not think plaintiff was psychotic, Kim felt that she was suicidal because of threats she made. The plaintiff did tell Kim that she was an epileptic who needed dilantin and Kim gave this information to defendant Lebedevitch.

Kim further testified that plaintiff remained stripped during her entire confinement "for safety precautions" for the observation of her behavior. Other than his initial visit, Kim did not visit plaintiff at any other time. Furthermore, Kim did not know if plaintiff ever received her dilantin. Kim also testified that there was no further reason for either defendant Lebedevitch or him to see plaintiff because of reports from personnel which indicated that she had been adjusting. He had no knowledge about a janitor or a group of students who observed plaintiff.

Plaintiff testified that she was ordered to disrobe by a male deputy. Both he and a female deputy were present when plaintiff removed her dress and bra. The female deputy explained to plaintiff that she had to disrobe because she was supposed to be a suicide case. According to plaintiff, she was taken from her cell to see a doctor. Plaintiff then spoke with defendant Kim who did not ask her if she was suicidal. Plaintiff testified that she was not suicidal. Kim did tell plaintiff that she could have her clothing back when she returned to her cell. However, her clothing was not returned.

Plaintiff stated that several times during her confinement, a male custodian stood outside her cell and stared. She also testified that on one occasion, the custodian

watched and whistled at her as she readied herself to use the bathroom. Plaintiff attempted to shield herself from his view by covering her bare chest with her arms. On another occasion, in defendant Kim's presence, a group of 10 or 12 men observed her. Plaintiff testified that Kim just looked at her and laughed.

Plaintiff stated that she was given dilantin her first evening in jail and the following day, she was given dilantin and tylenol. However, during her third day of confinement, plaintiff was not given her medication. Plaintiff also testified that after her interview with defendant Kim, she received no other visits from any social worker or psychologist.

Beverly Wagner, who was detained in a cell just two doors from plaintiff's cell, testified that after plaintiff was stripped, women inmates, deputies, medical personnel and a custodian walked by plaintiff's cell. She testified that the custodian was present every morning and Wagner chastised him for staring at the plaintiff who stood with her back to the custodian while trying to shield herself from his view. Wagner also stated that on the third day of plaintiff's confinement, the custodian stood by plaintiff's cell and whistled at her and she corroborated plaintiff's testimony about the group of men who observed plaintiff.

Several of plaintiff's relatives testified about the metamorphosis in both plaintiff's appearance and personality which coincided with her jail experience.

Dr. Lawrence Cantow, plaintiff's psychiatrist, testified that as a result of plaintiff's jail experience, she had feelings of humiliation, degradation, and unworthiness. Plaintiff first visited this witness in November, 1980. He diagnosed her condition as a chronic psychotic depressive reaction. He had prescribed antipsychotic and

antidepressive medication for her and he confirmed that plaintiff had been a potential suicidaal patient during her stay in jail. In his opinion, plaintiff should have been given psychiatric treatment and antipsychotic medication while she was in jail. He also opined that if her condition had been promptly recognized and treated, plaintiff would not have been psychotic for 5 years.

Plaintiff introduced expert testimony on the standard of practice in dealing with suicidal jail inmates. Jerome Gallagher, a psychologist and Director of Mental Health Services at the Ingham County Jail testified that, if an inmate's clothing was taken away, jail personnel should house the inmate in an isolated area where the inmate was "not visible to the mainstream of jail activity." Gallagher maintained that Kim had committed malpractice by not seeing plaintiff after his initial visit. As for the question of medication, he stated that the physician had to assume the responsibility for the medical issue. The Court noted for the record that this witness was not acquainted with large jails and this could be considered by the jury in evaluating the weight of Gallagher's testimony.

Frank Donley, a facilities inspector for the Michigan Department of Corrections, testified that when an inmate had to be stripped, the inmate was usually placed in a single cell away from the general housing unit, but the inmate was kept under continuous observation.

The Wayne County Jail Administrator, Frank Wilkerson, testified that defendants Kim and Lebedevitch worked under his supervision and he agreed that custodians and other personnel in the jail are Wayne County employees.

Dr. David Gendernalyk, a psychiatrist who evaluated plaintiff on defendants' behalf, testified that plaintiff

was not suffering from a psychosis. He did not think she was a chronic psychotic depressive. Rather, in his opinion, she had lifelong personality problems and he characterized her personality as masochistic. Furthermore, he opined that plaintiff was not psychotic in jail because if she had been, none of the events which allegedly took place would have "registered." Plaintiff would not have been aware of what went on. He also did not see a "close fit" between plaintiff's bad dreams/symptomology and her jail experiences.

Sgt. M.A. Clipper, a female deputy assigned to the women's division testified that the only people who would have stripped plaintiff would have been female deputies. If a male deputy had stripped plaintiff, it would have been a departure from standard procedure and wrong.

Plaintiff first claims that the trial court erred by granting a directed verdict of dismissal in favor of Wayne County on the issue of intentional infliction of emotional distress. The standard for appellate review of a trial court's decision on a motion for directed verdict is succinctly stated in *Holmes* v *Allstate Ins Co*, 119 Mich Mich App 710, 713; 326 NW2d 616 (1982), *lv den* 417 Mich 1018 (1983).

> "A reviewing court must review all the evidence presented to determine if a fact question exists. In doing so, this Court must view the evidence in a light most favorable to the nonmoving party, granting him every reasonable inference and resolving any conflict in the evidence in his favor. If the evidence viewed in that manner establishes a prima facie case, *i.e.*, presents a question upon which reasonable minds could differ, the trial court's grant of a directed verdict must

> be reversed. *Light* v *Schmidt*, 84 Mich App 51, 269 NW2d 304 (1978); *Cody* v *Marcel Electric Co*, 71 Mich App 714, 717; 248 NW2d 663 (1976), *lv den* 399 Mich 851 (1977)."

The "operation and maintenance of a jail is within the scope of performance of a uniquely governmental function which is accorded immunity from tort liability under provisions of MCL 691.1407, MSA 3.996(107)." *Chivas* v *Koehler*, 124 Mich App 195, 201; 333 NW2d 509 (1983) (and cases cited thereon).

In *Armstead* v *Jackson*, 121 Mich App 239, 243; 328 NW2d 541 (1981) we determined that:

> "A majority of the Supreme Court justices are in accord that intentionally tortious acts committed by agents of governmental units are not activities within the exercise or discharge of a governmental function and, consequently, not protected by governmental immunity. *Lockaby* v *Wayne County*, 406 Mich 65; 276 NW2d 1 (1979); *McCann* v *Michigan*, 398 Mich 65; 247 NW2d 521 (1976); *Shunk* v *Michigan*, 97 Mich App 626; 296 NW2d 129 (1980); *Antkiewicz* v *Motorists Mutual Ins Co*, 91 Mich App 389; 283 NW2d 749 (1979), *remanded on other grounds* 407 Mich 936 (1979)."

A governmental agency may be liable for an agent's intentional misconduct under the doctrine of respondeat superior. *Graves* v *Wayne County*, 124 Mich App 36, 41; 333 NW2d 740 (1983); *Gaston* v *Becker*, 111 Mich App 692; 314 NW2d 728 (1981).

Plaintiff alleged that defendant county intentionally inflicted emotional distress upon her as a result of being viewed in her unclothed state by several unnamed male employees of the Wayne County Sheriff's Department.

Trial testimony indicates that at least one male custodian viewed plaintiff. However, it is questionable whether male deputies actually viewed plaintiff or assisted in stripping her.

The *Graves* Court held that Const 1963, art 7, § 6 did not exempt the county from liability for a deputy sheriff's alleged wrongdoings under the respondent superior doctrine.

> "This section of the Michigan Constitution only exempts a county from any vicarious liability arising from acts of the county sheriff, not deputy sheriffs. In *Lockaby, supra*, p 77, while not directly addressing this issue, the Court said "[w]hile the county is constitutionally immune from 'responsib[ility]' for the sheriff's 'acts' that immunity does not extend to the acts of others in its employ". (Footnote omitted.) All seven justices of the *Lockaby* Court held that count I of Lockaby's complaint should be reinstated against defendant Wayne County. Count I alleged an intentional tort perpetrated against plaintiff by "unknown and unidentified officers, guards, and agents" of the defendant Wayne County Sheriff's Department. Thus, *Lockaby* strongly implies that while the aforementioned constitutional exemption applies to acts of the sheriff, it does not apply to the acts of deputy sheriffs or other employees of the sheriff." 124 Mich App 42-43.

This, according to *Graves*, defendant county may be held liable for acts of deputy sheriffs or other employees of the sheriff.

The first question for our determination is whether plaintiff submitted sufficient proofs to establish that defendant's unnamed agents or employees committed the tort of intentional infliction of emotional distress.

To define intentional infliction of emotional distress, this Court has adopted the standards set forth in 1 Restatement of Torts 2nd § 46.[1]

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[1] To define intentional infliction of emotional distress, this court has adopted the standards announced in 1 Restatement of Torts 2nd § 46 pp 71-72:

> "'[1] One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> "'[2] Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress.
>
> "'[a] To a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> "'[b] To any other person who is present at the time, if such distress results in bodily harm.' *Warren* v *June's Mobile Home Village* & Sales, Inc, supra, 390.

"With regard to the requirement that the defendant's conduct be 'extreme and outrageous', § 46, comment d, p 73 of the Retatement states:

> "'It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exlaim, "Outrageous!"'

[concluded on page A-64]

Our review of the case law[2] discussing this intentional tort campels us to conclude that the complained of conduct on the part of any unnamed male deputy sheriffs was not outrageous in character. The deputies who took plaintiff's clothing from her did so as a cautionary measure to protect plaintiff who was in a suicidal state. Furthermore, even if, as plaintiff claimed, a male deputy was present when plaintiff was stripped, the record does not establish that plaintiff was viewed by other male deputies at any other time.

While the incidents concerning the unidentified male custodian were most unfortunate, it is our opinion that the evidence presented was not sufficient to support a finding that the isolated incidents, in and of themselves, characterize conduct giving rise to the tort of intentional infliction of emotional distress. Therefore, neither the unnamed deputy sheriffs' conduct nor the custodian's conduct would have created vircarious liability on defendant county's part.

However, plaintiff also alleged in a separate claim of intentional infliction of emotional distress that the conduct of defendants Kim and Lebedevitch, while acting within the scope of their employment, (as emplovees of defendant county) caused plaintiff to be disrobed and re-

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(continued from page A-63)

> "'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' Id., 390-391." *Ledsinger* v *Burmeister*, 114 Mich App 12, 17-18; 318 NW2d 558 (1982).

[2] See *Holmes* v *Allstate Insurance Co*, *supra*; *Meyer* v *Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982), lv den 417 Mich 993 (1983); *Ledsinger* v *Burmeister*, 114 Mich App 12; 318 NW2d 558 (1982); *Fry* v *Ionia Sentinel Standard*, 101 Mich App 725; 300 NW2d 687 (1980); *Mosely* v *Federal Department Stores, Inc*, 85 Mich App 333; 271 NW2d 224 (1978); *Warren* v *June's Mobile Home Village and Sales, Inc*, 66 Mich App 386; 239 NW2d 380 (1976).

main in such a state during her confinement. Because the trail court only dismissed this claim against defendant county and not defendants Kim and Lebedevitch, we believe that the court erred in directing a verdict. Although the individual defendants were sued both jointly and severally, a finding that either or both committed the tort of intentional infliction of emotional distress would have necessitated a determination of whether defendant county could have been held liable under the doctrine of respondeat superior.

To explain liability under the doctrine of respondeat superior, the *Graves* Court quoted Justice Kavanagh's opinion in *McCann* v *Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976):

> "Under the doctrine of respondeat superior there is no liability on the part of an employer for torts committed by an employee beyond the scope of the employer's business. *Bradley* v *Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951). The employer is liable, however, for the acts of his employee when the employee is acting within the scope of his authority, even though acting contrary to instructions. *Poledna* v *Bendix Aviation Corp*, 360 Mich 129; 103 NW2d 789 (1960). The employer is also liable for the torts of his employee if 'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation'. 1 Restatement Agency, 2d § 219 (2) (d), p 481. Of course, the employer is not able to instruct his employee only to act within the confines of the law, thereby insulating him from vicarious liability if the employee acts otherwise. *Anschutz* v *Liquor Control Comm*, 343 Mich

630; 73 NW2d 533 (1955). See also, *Barnes* v *Mitchell*, 341 Mich 7; 67 NW2d 208 (1954).

> "Whether an agent of a governmental entity alleged to be liable under a respondeat superior theory has acted within his or her apparent authority is a question of fact. *McCann*, pp 72, 81; see *Gaston*, *supra*, p 701. 124 Mich App 41-42."

Proof of the agent's intentional tortious conduct sufficient to overcome the county's defense of governmental immunity will not automatically impose liability upon the county. See *Armstead* v *Jackson*, *supra* at 244. The *Armstead* Court explained:

> "There must be a secondary determination that the township was vicariously liable for the officer's acts under the doctrine of respondeat superior. This requires a finding that defendant Jackson was acting within the scope or apparent scope of his employment. *McCann* v *Michigan*, 398 Mich 65, 71-72; 247 NW2d 521 (1976); *Galli* v *Kirkeby*, 398 Mich 527; 538; 248 NW2d 149 (1976); *Bozarth* v *Harper Creed School Dist*, 94 Mich App 351, 354; 288 NW2d 424 (1979). This is a question of fact to be determined by the trier of fact. *McCann* v *Michigan*, *supra*; *Capitol City Lodge No 141* v *Meridian Twp*, 90 Mich App 533, 538; 282 NW2d 383 (1979), *lv den* 408 Mich 856 (1980); *Lincoln* v *Fairfield-Nobel Co*, 76 Mich App 514, 519; 257 NW2d 148 (1977)." 121 Mich App 244-245.

Although we have determined that the trial court erred in directing a verdict in favor of Wayne County, a remand for trail on this issue is not mandated. The jury did not find that either defendants Kim or Lebedevitch committed the tort of intentional infliction of emo-

tional distress. Therefore, no liability could have been imposed on the defendant county.

Plaintiff's next claim is the trial court erred in granting defendant, Wayne County, a directed verdict of dismissal on plaintiff's two § 1983 claims because (1) testimony established that the policies and customs of the jail precipitated the invasion of plaintiff's privacy and (2) institutional policies enhanced the likelihood of negligence on the part of defendants Lebedevitch and Kim in their failure to provide medical treatment to plaintiff and assess her psychological condition.

The liability of a municipality under § 1983 is explained in *Moore* v *City of Detroit*, 128 Mich App 491, 498-4, 502; _____ NW2d _____ (1983) as follows:

"42 USC 1983 provides in pertinent part:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

> "To establish a right to relief under § 1983, a plaintiff must plead and prove two elements: (1) that he has been deprived of a right secured by the Constitution and laws of the United States; and (2) that defendant deprived him of this right while acting under color of law. *Parratt* v *Taylor*, 451 US 527; 101 S Ct 1908; 68 L ED 2d 420 (1981); *Paul* v *Davis*, 424 US 693; 96 S Ct 1155; 47 L Ed 2d 405 (1976).

"Municipalities are persons for purposes of § 1983 liability. *Monell* v *Dep't of Social Services of City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Zmija* V *Baron*, 119 Mich App 524, 534; 326 NW2d 908 (1982). *A municipality cannot, however, be found liable under § 1983 on a respondeat superior theory. Monell; supra*, p 694; *Zmija, supra*, p 535; *Popow* v *City of Margate*, 476 F Supp 1237, 1245 (D N J, 1979). Specifically, the plaintiff must show an affirmative link between the misconduct and the adoption of any plan or policy, showing defendant's authorization for approval of such conduct. *Rizzo* v *Goode*, 423 US 362; 96 S Ct 598; 46 L ED 2d 561 (1976); *Popow, supra*, p 1245; *Hayes* v *Jefferson County, supra*, p 872.

* * *

"While the Supreme Court has not set the full contours of municipal liability under § 1983, federal courts and this Court have attempted to set the parameters. See *Zmija, supra*, p 535; *Popow, supra; Hays* v *Jefferson County, supra*. Numerous decisions have recognized that proof of mere negligence is inssufficient. See, generally, *Zmija, supra; Popow, supra; Leite* v *City of Providence*, 463 F Supp 585 (D R I, 1978). The applicable standard has been described as deliberate indifference, gross negligence, or recklessness. *Zmija, supra*, p 535."[3] (Emphasis added.)

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[3] In both *Cook* v *City of Detroit*, 125 Mich App 724, 731; 337 NW2d 277 (1983) and *Moore, supra*, the panels applied the "deliberate indifference" standard to § 1983 actions involving allegations of the city's failure to properly select, train and supervise its police officers. We see no reason to apply a different standard in the case at bar.

Testimony at trial indicates that plaintiff was exposed to passersby of the opposite sex while she was clad only in panties. In *Fisher* v *Washington Metro Area Transit Authority*, 690 F2d 1133, 1142 (CA 4, 1982), the court determined that a pretrial detainee has a general right, "constitutionally protected, not to be subjected by state action to involuntary exposure in the state of nakedness to members of the opposite sex unless that exposure was reasonably necessary in maintaining her otherwise legal detention."[4] The question for the court's determination was whether the sheriff could be held liable under § 1983 for any deprivation of rights that may have occurred.

The *Fisher* Court upheld the trial court's directed verdict in favor of the defendant sheriff:

> "There is no evidence that Clements participated directly in any of the events of Fisher's detention. He cannot be held liable vicariously under § 1983 for any conduct of his subordinates.

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[4] While she was housed in a cell in the women's detention center, Fisher, using her brassiere, feigned a suicide attempt. She was transferred to an isolation cell adapted for suicidal detainees/inmates. The cell, located in an area which houses male inmates, was an unfurnished room, and it contained an elevated camera that relayed a close circuit picture to a control room located on the floor among the general population. All the walls of the control room which contained the screens used to monitor parts of the center were made of bulletproof glass.

Fisher was placed in the isolation cell naked except for her underpants and she remained in the room for approximately fifteen hours. Under her § 1983 claim, plaintiff alleged "that though her stripped confinement was not 'per se' . . . constitutionally improper, her 'stripped confinement under conditions where she could be and was observed by male guards and even male inmates . . . violated her right to privacy and confined her under intolerable conditions in violation of her due process rights.'" 690 F2d 1142. However, Fisher did concede "that the 'broad discretion given jailers faced with apparently suicidal detainees precludes' any claim 'that placing her in a cell and removing her clothes under appropriate conditions was a constitutional violation.'" 690 F2d 1141. The Court stated that it was a concession well made.

Vinnedge v *Gibbs*, 550 F2d 926 (4th Cir 1977). Neither could he be held liable on the basis of a failure adequately to supervise or control any conduct that directly caused the specific deprivation charged. *Rizzo* v *Goode*, 423 US 362, 370-71, 376-77, 96 S Ct 598, 603, 604, 606-607, 46 L Ed 2d 561 (1976). Only if the evidence showed that conduct directly causing the deprivation was done to effectuate an official policy or custom for which Clements was responsible could he be liable. *Hall* v *Tawney*, 621 F2d 607 (4th Cir 1980); *Vinnedge* v *Gibbs*, 550 F2d 926. The evidence would not support such a finding.

"This is obvious when attention is focussed [sic] on the specific depreivation charged. It is not, as above indicated, that Fisher was placed in a detention cell with her clothes removed following her feigned suicide attempt. That might well have been done in effectuation of a general policy respecting the treatment of such detainees for which Clements was responsible. Indeed, his own testimony probably established a willing acceptance of responsibility for such a policy. But the deprivation charged here was more narrowly the exposure to male viewing that was alleged than to have ensued. There is nothing in the evidence either directly or indirectly supporting any determination that such an exposure was also in keeping with established policy or developed custom chargeable to Clements. Instead, all the evidence on the point was to the contrary: that the policy was to protect a detainee such as Fisher whose clothing had been removed under these circumstances from indiscriminate viewing by any but female custodians. That this policy may have been violated on this occasion by unau-

> thorized subordinate conduct — or by sheet [sic] accident beyond the control of any official — cannot be charged to Clements under developed § 1983 doctrine. Cf. *Logan* v *Shealy*, 660 F2d 1007 (strip search policy concededly that of sheriff)." 690 F2d at 1142-1143. (Emphasis added).

We recognize that in the context of the penitentiary, "the emerging case law * * * establishes a right to be free from * * * invasions of privacy." *Hudson* v *Goodlander*, 494 F Supp 890, 891 (D Md, 1980). "The privacy interest entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex." *Forts* v *Ward*, 621 F2d 1210, 1217 (CA 2, 1980).

In *Hudson*, the plaintiff, an inmate, alleged in his complaint "That the constitutional right to privacy was violated when female correctional officers viewed him using the toilet, undressing, and showering." *Id* at 891. Although the Court determined "that the plaintiff's rights were violated by the assignment of female guards to posts where they could view him while he was completely or entirely unclothed," *Id* at 893, it found that the plaintiff was not entitled to damages because defendants "acted reasonably, albeit incorrectly, in setting the challenged policy." *Id* at 895.[5]

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[5] As explained in *Hudson*:

> "The confrontation of existing rights highlighted in this case is not unexpected. The defendants are caught in a situation where, by attempting to insure equal employment opportunitities to females, they have infringed upon the privacy rights of the inmates." 494 F Supp 891.

(*concluded on page A-72*)

The question for our determination is whether plaintiff showed "an affirmative link between the alleged misconduct [invasion of privacy] and the adoption of any plan or policy showing [defendant county's] authorization or approval of such conduct." *Moore, supra* at 499.

Frank Wilkerson, the jail administrator, testified that he "set policies" or developed policies or developed policies with the help of his staff for the jail and he explained that the sheriff had to approve the policies. He indicated that there was no "policy" that permitted males to sometimes appear where the females were housed. However, he could conceive of occasions which would necessitate the presence of males (emergencies such as evacuation of prisoners, additional security measures, shortage of staff, maintenance problems).

(*continued from page A-71*)

We note that the *Hudson* case was decided solely on constitutional grounds after the Court balanced the governmental interests advanced by defendants in support of their policy assigning female guards to certain posts against the inmates' privacy interests. Even though plaintiff's rights were violated, the court denied plaintiff's claim for damages:

> "As prison officials, the defendants are entitled to qualified immunity on the damage claim. However, 'the immunity defense would be unavailing . . . if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have know that their conduct violated the constitutional norm.' *Procunier* v *Navaretq*, 434 US 555, 562, 98 S Ct 855, 860, 55 L Ed 2d 24 (1978). An examination of the case law in this area reveals a wide disparity in the judicially mandated accommodation of equal employment opportunity policies and privacy interests of inmates. The defendants clearly attempted to conform their conduct to what they perceived to be the constitutional norm. Given the importance of each of the competing interests, and the relative dearth of clear judicial guidance in this area, the Court finds that the defendants acted reasonably, albeit incorrectly, in setting the challenged policy. Therefore, the claim for damages will be denied." 494 F Supp 894-895.

Wilkerson did not know if male custodians had been on the floor where defendant was housed and he stated that it was not the policy or custom to use male custodians in that area, "it was not and is not" a regular and ordinary occurrance. Female custodians handled the women's area. Although there was a policy where classes of professional (i.e. medical, psychiatric and sociology) students were allowed to go up on the women's floor, the policy did not include allowing students to walk by a cell housing a nude woman. However, Wilkerson opined that there could be exceptions where medical students were concerned.

Sgt. M. A. Clipper stated that men were not normally allowed in the women's division. She testified that there were occasions when males such as doctors or custodians would be present. However, it was a routine habit in the division for the deputies to announce the presence of a male who would then be accompanied by a female who walked in front of him to make sure everything was "all right."

Const 1963, art 7, § 6 exempts the county from liability for the sheriff's acts. See *Graves*, *supra* at 42-43. According to Wilkerson's testimony, the sheriff had to approve jail policy. On this basis alone, we could find the county exempt from liability under § 1983. However, at one point, Wilkerson, a county employee, also testified that he also "set policies."[6] It is clear that defendant county cannot be held responsible under § 1983 under

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[6] In *Avery* v *Burke*, 600 F2d 111 (CA 4, 1981), the plaintiff sued inter alia the county, the county board of health, the county board of social services and various individual medical personnel. The plaintiff alleged that the defendants wrongfully caused her sterilization after informing her that she had the sickle cell trait. Under North Carolina law, neither the board of health nor the board of social services could be sued as a separate entity. Therefore, the court deter-

(*concluded on page A-74*)

the doctrine of respondeat superior. Therefore, applying the law as discussed in *Moore, supra*, to our review of the record, it is our opinion that any intrusions upon plaintiff's privacy were not the result of a policy authorized or approved by defendant county. Furthermore, we find that the record does not reflect a "deliberate indifference" to plaintiff's constitutional right to privacy on

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(*continued from page A-73*)

mined that if plaintiff was entitled to recover damages under § 1983, because of the conduct of the respective boards, the county would be held liable since the boards were extensions of the county.

The court explained that the county and boards may be liable under § 1983 if their policies or customs actually caused plaintiff's injuries. However, the plaintiff did not have to prove that members of the boards expressly authorized or participated in her sterilization.

> "Official policy may be established by the omissions of supervisory officials as well as from their affirmative acts. In *Withers* v *Levine*, 615 F2d 158 (4th Cir 1980), we held that supervisory officials charged with the responsibility of making rules may be subject to § 1983 liability where their unreasonable failure to make rules causes their employees' unconstitutional practices. Accord, *Dimarzo* v *Cahill*, 575 F2d 15, 17-18 (1st Cir 1978). Thus the conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference to Avery's right of procreation or constituted tacit authorization of her sterilization. See *Estelle* v *Gamble*, 429 U.S. 97, 105-06, 97 S.Ct. 285, 291-92, 50 L.Ed. 2d 251 (1976); *Turpin* v *Mailet*, 619 F2d 196, 201 (2d Cir 1980); Note, *Municipal Liability under Section 1983: The Meaning of 'Policy or Custom,'* 79 Columbia L. Rev. 304, 309-18 (1979). This issue generally is one of fact, not law. See *Turpin*, 619 F2d at 201.
>
> "[5] A single incident or isolated incidents are normally insufficient to establish supervisory inaction upon which § 1983 liability may be based. *Woodhous* v *Virginia*, 487 F2d 889 (4th Cir 1973)." 660 F2d 114.

In the instant case, as compared to *Avery* v *Burke*, the county and defendants Lebedevitch and Kim were named as defendants. The plaintiff herein did not sue the sheriff. Nor did she sue the jail administrator or any deputies. Therefore, even if Wilkerson should have promulgated a policy and did not, with respect to permitting males on the women's floor, we believe that defendant county could not be held liable because of Wilkerson's inaction which does not appear to us to rise to the level of deliberate indifference to the plaintiff's right to privacy.

the part of defendant county. Therefore, we hold that the trail court did not err in directing a verdict in favor of defendant county on this portion of plaintiff's § 1983 claim.

Plaintiff also argues that defendant county was liable under § 1983 because defendant's policies contributed to the denial of plaintiff's medication and the negligence of defendants Kim and Lebedevitch.

A cause of action under § 1983 is allowed:

> " . . . if the plaintiff alleges 'acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.' *Estelle* v *Gamble*, 429 US 97, 106; 97 S CT 285, 292; 50 L Ed 2d 251, 261 (1976). Every prisoner has the right to receive medical care under circumstances in which a reasonable person would seek medical care. *Rust* v *Alaska*, 582 P2d 134, 143, fn 34 (Alas, 1978). Prison or jail authorities must make available a level of medical care reasonably designed to meet the inmate's routine and emergency health care needs. *Ramos* v *Lamm*, 639 F2d 559, 574 (CA 10, 1980), *cert den* 450 US 1041; 101 S Ct 1759; 68 L Ed 2d 239 (1981). A prisoner is entitled not only to have his physical needs met, but also to have his psychological needs met. *Inmates of the Allegheny County Jail* v *Pierce*, 612 F2d 754 (CA 3, 1979); *Bowring* v *Godwin*, 551 F2d 44, 47 (CA 4, 1977).
>
> 'In evaluating a plaintiff's claim of failure to provide necessary medical care and treatment, Courts have a two-step test: 'It requires deliberate indifference on the part of [the] officials and it requires the prisoner's medical needs to be serious.'" *West* v *Keve*, 571 F2d 158, 161 (CA 3, 1978).

> "*Hendrix* v *Faulkner*, 525 F Supp 435, 454 (ND Ill, 1981), explained the second of these requirements: 'A medical need is serious if it is "one that had been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."' *Laaman* v *Hegemoe*, [437 F Supp 267], 311 (1977)." *Brewer* v *Perrin*, _____Mich App _____; _____ NW2d _____(Dkt. #68478 *rel'd* 3/5/'84)

The *Brewer* panel explained that to show deliberate indifference, "a plaintiff must 'show either denied or unreasonably delayed access to a physician for diagnosis or treatment of a discomfort-causing ailment, or failure to provide prescribed treatment.'" *Todaro* v *Ward*, 431 F Supp 1129, 1133 (SD NY, 1977). See also *Ramos*, *supra*, 639 F2d 575. (Footnote omitted). *Brewer*, *supra*, at 7.

In the instant case, plaintiff testified that she needed her epilepsy medication on a daily basis. She also testified that she only received the medication during the first two days of her confinement. However, it is unclear from the record whether she received the medication during the first two or last two days of confinement. Furthermore, testimony indicates that it was the policy of the jail to take from any incoming detainees

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[7] The *Brewer* panel's footnote explained:

> "*Estelle* is an Eighth Amendment case. Because Gary was merely a detainee, the Eighth Amendment does not apply. *Bell* v *Wolfish*, 441 US 520, 535; fn 16; 99 S Ct 1861, 1872, fn 16; 60 L Ed 2d 447, 466, fn 16 (1979). However, Eighth Amendment analysis provides useful analogies to plaintiff's due process claim; due process protects a detainee from abusive treatment. *Meshkov* v *Abington Twp*, 517 F Supp 1280, 1284 (ED Pa, 1981). Moreover, "[i]t would be anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted." *Hampton* v *Holmesburg Prison Officials*, 546 f2d 1077-1080 (CA 3, 1976).

medicine they brought with them and had in their possession for safety precautions until the medical staff could evaluate the individual needs of the detainee. Thus, the medicine plaintiff brought with her was confiscated. Wilkerson testified that the medical department was responsible for dispensing medication and medical policy. Kim's testimony indicated that the dispensing of this medication was a medical matter within Lebedevitch's authority.

In our opinion, the record does not adequately show that the complained of conduct, deprivation of allegedly essential medication, was a result of defendant county's policy or custom or a "deliberate indifference" on the part of defendant county. However, we believe that the evidence presented at trail on this issue may have been sufficient to go to the jury on the individual § 1983 claims against defendants Kim and Lebedevitch, but, the evidence at most, would only have established a respondeat superior claim against defendant county which is not cognizable under § 1983. Therefore, we hold that the trial court did not err in directing a verdict against defendant county on this portion of defendant's claim.

Plaintiff also claims error in the trial court's decision to exclude three exhibits from the jury room. "Taking of exhibits to the jury room lies within the discretion of the trial judge . . . without regard to the testimonial or non-testimonial nature of the items at issue." *Socha* v *Passino*, 405 Mich 458, 471; 275 NW2d 243 (1979). The exhibits in question consisted of two circuit court opinions and a circuit court order. Plaintiff asserts prejudice resulted from exclusion of the exhibits since the documents set forth the duties and obligations of defendants Kim and Lebedevitch. The record discloses that the jury was fully informed in open court on this issue and under

these circumstances, no prejudice could have resulted. *Silvertsone* v *Assurance Corp*, 187 Mich 333, 343; 153 NW 802 (1910); *Metcalf* v *Waterbury*, 60 Mich App 553, 558; 231 NW2d 437, *lv den* 394 Mich 821 (1975). There was no abuse of discretion.

Plaintiff's fourth claim is that the trail court erred in its refusal to allow plaintiff to belatedly read from defendant Kim's deposition. Although the trial judge refused to allow plaintiff's counsel to read from defendant Kim's deposition after Kim had been excused as a witness, the judge gave counsel an opportunity to submit the particular questions he wished to read. Counsel failed to avail himself of this opportunity. It is apparent from the record that counsel claimed a right to read freely from the deposition. There is no such right. Rather, a deposition may be used to impeach a party-witness "so far as admissible under the rules of evidence." GCR 1963, 302.4. A witness may be impeached through use of his prior inconsistent statement only if counsel lays a proper foundation. MRE 613(a). In the instant case, plaintiff had a clear chance to impeach Kim with the deposition, and did so at one point in a proper manner. Counsel then waited for the witness to be excused before attempting to extrinsically impeach Kim with the deposition. If permitted, this method would have been improper. We find no error in the trial court's ruling.

We also find that the trial court did not err in allowing cross-examination by defense counsel as to criminal charges against plaintiff's witness and members of plaintiff's family. Plaintiff opened the door to the testimony which she assigns as error on appeal. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(b). Wagner's assertion that she was in jail for second degree murder was a misrepresentation. Thus, defendants were not required to allow her assertion to go unanswered.

The criminal charges against plaintiff's family were initially brought to the jury's attention by plaintiff on direct examination. "[H]aving herself opened the door to that testimony, she cannot now complain because defendant thereupon more fully developed the subject matter." *LaLonde* v *Roman Standard Life Ins Co*, 269 Mich 330, 333; 357 NW 834 (1934).

We have reviewed the record and certain complained of statements in the context in which they were made and we conclude that the trial judge acted with restraint in the face of various questionable tactics employed by plaintiff's attorney and he made no remarks which could have conceivably prejudiced the jury in favor of the defendants.

Plaintiff also alleges error in the jury instructions. The court correctly instructed the jury on the defective building theory of liability by reading the statute. The allegedly erroneous instructions cited by plaintiff were given in conjuction with the Court's instructions on intentional infliction of emotional distress. Since the court had already directed a verdict in favor of defendant county on that issue, the instructions should not have been given. Nevertheless, the jury's decision on the building defect claim could not have been affected by these superfluous instructions. As such, the error was harmless beyond a reasonable doubt.

Plaintiff's final contention is that reversal is required due to contact between the bailiff and the jury during deliberations. We find no merit to this claim.

The record herein reveals that the bailiff gave no instructions to the jury on any legal or evidentiary issue. While all attorneys were present, the bailiff responded to a knock on the jury room door and he momentarily entered the threshold of the jury room. At plaintiff's re-

quest, the bailiff testified that when various jurors began to ask him questions, he simply told them to write a note for the judge.

In Michigan there is a strict rule prohibiting communication with a deliberating jury outside of the courtroom and the presence of counsel. *People* v *Cain*, 409 Mich 858, 294 NW2d 692 (1980), *rev'd*, 94 Mich App 644; 290 NW2d 54 (1980); *People* v *Kangas*, 366 Mich 201; 113 NW2d 865 (1966), *People* v *Washington*, 119 Mich App 373, 375; 326 NW2d 514 (1982). In *Cain*, *supra*, the bailiff took a note from the jury to the judge, which inquired whether the verdict need be unanimous. 94 Mich App 645. At the judge's direction, the bailiff told the jury their verdict had to be unanimous. *Id.* The Supreme Court reversed the subsequent conviction.

A fair reading of the above cases indicates that reversal is required where any instruction is given to the jury after the commencement of deliberations, other than in open court in the presence of counsel.

In *Wilson* v *Hartley*, 365 Mich 188, 189; 112 NW2d 567 (1961), the judge, through his clerk, instructed the jury *ex parte* as to the proper form to be used in rendering its verdict. The Supreme Court, noting "the communication here in question and the answer thereto did not pertain to any phase of the case bearing upon plaintiff's right to recover," found no prejudice. *Id.* 190. Accord: *Mason* v *Lovins*, 24 Mich App 101, 115-116; 190 NW2d 73 (1970).

In this case, there is absolutely no possibility that the bailiff could have swayed the jury in any manner by

telling them to write a note to the judge. Such was the proper thing to do under the circumstances.

Affirmed. We do not retain jurisdiction.

/s/ Vincent J. Brennan
/s/ Walter P. Cynar
/s/ Charles W. Simon, Jr.

JUDGMENT FOR DEFENDANTS

(State of Michigan — Circuit Court — County of Wayne)

(Filed December 2, 1981)

(LINDA HARTLEY RUSHING, Plaintiff, -vs- COUNTY OF WAYNE; YOU KIM and LEBEDEVITCH, Jointly and Severally, Defendants — Circuit Court Case Number: 77-724 529 NZ; HONORABLE JAMES A. HATHAWAY)

At a session of said Court held in the Lafayette Building, City of Detroit, County of Wayne, State of Michigan, on: December 2, 1981.

PRESENT: HONORABLE JAMES A. HATHAWAY.

The Jury by whom the issue joined in this cause was tried having rendered a verdict in favor of the Defendants, COUNTY OF WAYNE, MILAS LEBEDEVITCH and YOU KIM, and against the Plaintiff;

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing by her suit against Defendants and said Defendants recover against Plaintiff their costs and charges to be taxed, and have execution thereof.

/s/ James A. Hathaway
CIRCUIT JUDGE

ARGUMENTS AND OPINION OF TRIAL COURT REGARDING DEFENDANTS' MOTION FOR DIRECTED VERDICT

(State of Michigan — Circuit Court — County of Wayne)

(Proceedings of November 10, 1981)

* * *

(61) * * * MR. KUDLA: The Court will have to excuse me for one second. It is late in the day.

I am going to renew my motion for directed verdict at this time based upon all of the arguments presented to Court on Thursday of last week. In addition to that, I would like to add several things. Number one, the Court has taken care of the punitive damages. We will skip that.

We would like to go to the case of Monell vs City of New York with regard to the question of civil right violations by the County of Wayne. We are asking the Court to dismiss the County of Wayne because there has been no proof put into this case that would indicate that the County of Wayne breached any of the civil rights of the Plaintiff in this case.

I am going to quote Monell vs City of New York, Department of Social Services. This is from 56 Law 2d 611 at page 635. It defines what color of law is. Local governing bodies therefore can be sued directly under section 1983 for monetary, declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.

(62) We have seen copious evidence in this court, Your Honor, that all of the policies with regard to the way that the, alleged way that Linda Hartley Rushing was treated were not in fact the policies of Wayne County despite the attempt of Plaintiff's Counsel on nu-

merous occasions to get everybody to admit or attempt to get everybody to admit that these were policies of Wayne County.

There has been absolutely not one iota of evidence in this case that any of the policies arising out of which Linda Hartley Rushing was stripped, subjected allegedly to view by other people.

The question of withholding medication and the question of either Mr. You Kim or Milas Lebedevitch seeing or not seeing her were policies of the County. As a matter of fact, it's been stated on numerous occasions that these were policies of the Sheriff, a party that is not in this lawsuit. Absolutely not in this lawsuit.

On this basis we believe that the County is improperly in this case under alleged civil right violations.

I would indicate also with regard to the individual Defendants, Mr. You Kim and Mila [sic] Lebedevitch, the question of civil right violations with regard to those two people are in the areas of medication and right to privacy. I believe that a succinct statement of the areas that the (63) Plaintiff's questions with regard to them.

There has been absolutely no evidence, nor does Plaintiff's Complaint ever claim who was responsible for giving medication, i.e. that epileptic medication to the Plaintiff.

There has been, as a matter of fact, there was copious testimony there was a medical department there with a qualified M.D. who is not Dr. Milas Lebedevitch that governed the use of medication within the Wayne County Jail.

Also, we all know that Mr. Kim was not responsible for giving or authorizing medication, especially medication for a health condition.

Thirdly, the question with regard to whether or not Plaintiff's evidence with regard to whether Plaintiff was injured by an alleged withholding of medication on the

part of the jail, there is no evidence that she was in fact injured, absolutely none. There's not one iota of evidence she suffered injury for having medication as Plaintiff says withheld from her on two occasions.

With regard to the right of privacy we have three cases. The Court will have to bear with me. I will give the Court the names of the cases in quick succession. I cite the case of Rosenberg vs Martin; the case of Hudson vs Levy; and, the case of Forts vs Ward.

(64) THE COURT: Did you say Forts vs Ward?

MR. KUDLA: Right.

THE COURT: F-o-r-t-s?

MR. KUDLA: Yes. Excuse me, I gave you a mis-cite. It is Hudson vs Goodlander, not Hudson vs Levy. The citation on Hudson vs Goodlander is 494 Fed Sup 890. That is a 1980 case. That case indicates that an inmate's privacy rights are necessarily rights of privacy are necessary, give way to the interest of the public in areas where we're dealing with jail situations.

The specific language, the specific holding of Hudson is very interesting. The Court held in its final decision neither an inadvertent encounter nor regularly scheduled visit by a female employee at an announced time would rise to the level of constitutional deprivation to right of privacy of an inmate who alleged that female correctional officers viewed him using the toilet, undressing and showering.

The case of Rosenberg vs Martin is cited at 478 Fed 2d 520, a 1973 case. That case also stands for the interest and privacy of, in this instance, of a fugitive suspected of a serious crime must yield to the public interest. It also goes on to state a State prisoner must establish the deprivation of constitutional rights.

I don't think by any stretch of the (65) imagination has Linda Rushing showed any deprivation of constitutional rights.

In addition to that we have the case of Forts vs Ward which cites the case of Bell vs Wolfish. The case of Forts vs Ward is cited at 471 Fed Sup 1095, a 1978 case.

In that case, as I indicated, the Court cited the case of Wolfish vs Levy, W-o-l-f-i-s-h vs Levy, L-e-v-y, 573 Fed 2d 118 wherein the Court held obviously an individual's normal right to privacy must necessarily be abridged upon incarceration in the interest of security of the institution.

The question arises at this time who invaded the privacy of the Plaintiff? Was it the County of Wayne who had no function whatsoever in that jail but to provide a building and housing for the inmates?

Was it Mr. Kim and Mr. Lebedevitch and Dr. Lebedevitch who had absolutely no right to control where Linda Hartley Rushing was to be placed with regard to suicide prevention?

Was it Kim and Lebedevitch who in fact stripped the prisoner pursuant to court order?

Evidence to that effect indicated that stripping occurs in other counties and, included in, including the County of Ingham by Plaintiff's own so-called (66) expert witness.

The evidence shows that the standards in this instance were set by the Court, a State institution, not a County institution. They were required to be followed by another institution, the Wayne County Sheriff.

Neither one of these is a party to this lawsuit. Anything that occurred in the jail occurred as a result of the operations of that jail.

The County of Wayne had absolutely no contact with the policy making nor the placement of the prisoner in that cell, nor the control of people that went to and fro within the areas of the jail that were controlled by the Sheriff and on the basis of Monell and Owen vs City of

Independence, I don't believe there has been any showing whatsoever of any civil right infractions by the County of Wayne.

On that basis I am asking the County of Wayne be dismissed.

I am also asking that because of the statements made about Kim and Lebedevitch have the case dismissed with regard to civil right violations with regard to them.

The allegation with regard to Kim and Lebedevitch and Plaintiff's Complaint indicate that they (67) intentionally and needlessly disrobed her. There is no evidence of that in this case.

They intentionally compelled the Plaintiff to remain disrobed.

There's no evidence of that in this case.

That the Defendants deliberately ignored requests to have her shielded from the view of others.

There's absolutely not one iota of evidence in this that anybody requested that she be shielded. The only testimony that was put in in this case was the testimony of Linda Hartley Rushing who said I don't know why they took my clothes away. No evidence from Beverly, her so-called friend, nor any testimony by Linda Hartley Rushing that in fact she asked anybody, either Beverly to ask somebody for her or herself to ask a deputy for assistance.

Therefore, there could not be a deliberate ignoring with conscious indifference and malice. Those are the allegations of intentional harm.

With regard to, I would say civil rights. The County of Wayne should also be let out of the case with regard to intentional tort, most specifically Plaintiff's allegations of intentional infliction of emotional distress because the holdings in this case with regard to (68) governmental immunity are that government agencies are in fact immune from any tort action even when a tort

amounts to an intentional act, when they are in the exercise or discharge of a governmental function.

For that I will cite to the Court the case of Jacobs vs State of Michigan, Department of Mental Health, 88 Mich Ap 503. That is a 1979 case.

That case refers to the case of Galley vs Kirkeby for the same proposition, that's at 398 Mich 536 and 537.

I will also cite the Court the case of Tongson vs City of Utica, 83 Mich Ap 679, a 1978 case. I will further cite the case of Walkowski vs Macomb, 64 Mich Ap 460.

I think the most appropriate case, although all four cases with regard to that law are on all four here, is the Jacobs case. In this case an employee of the Department of Mental Health was charged with assault and battery on an inmate of the hospital. The inmate sued the State of Michigan, Department of Mental Health for intentional misconduct and argued that because it was intentional it was outside the scope of a governmental activity.

The Court states in its ruling that within the statute providing the State and its agents are generally immune from tort liability when the agency is engaged (69) in the exercise or discharge of a governmental function. An act may be exercised or discharge of governmental function even though it amounts to an intentional tort.

What can be more intentional in this case than an assault and battery.

I would direct the Court again to the cases that were cited Thursday, the two new slip cases of Ebberhard vs Board of Education and Fuhrman vs Hattaway. From the Ebberhard case that Plaintiff never claimed in his Complaint that he was not acting within the scope of his employment. As a matter of fact, paragraph three and paragraph four covering You Kim and Milas Lebedevitch indicate they were in fact acting within the scope of their employment for the County of Wayne.

The Ebberhard case states again that the appropriate law in the State of Michigan is that employees' actions performed within the scope of a governmental function are cloaked with governmental immunity and, more appropriate with regard to the professional aspects of their authority is the case of Fuhrma vs Hattaway which specifically discusses psychiatrists and states exactly the same thing, personnel employed by the Center are acting within the scope of a governmental function. As such they are cloaked with governmental immunity.

Again, the Court discusses the (70) actions of the psychiatrist.

What are those actions?

The Court says they're not ministerial, that they are the ultimate in discretion and if, in fact, they're the ultimate in discretion, then they cannot possibly be ultra-vires the actions taking place in the Wayne County Jail.

Over and above that we must remember the operation that includes everything within the Wayne County Jail ordered by the Court or otherwise is a governmental function. There are enough cases around that tell us that, including Lockaby. So, if the Court orders that there shall be a psychiatrist and psychologist on the premises to care for or to minister to the needs of the inmates, that operation within that jail is a governmental function under Ebberhard and under Fuhrman. It is determined by the Court of Appeals that's what is done in that jail by those people, whatever actions they are, as long as they are not ultra-vires, what goes on in that jail, those actions are immune from tort liability.

This Court has listened to the evidence and I think from its determination that no punitive or exemplary damages should be given, the Court also realizes there was never any evidence put into this case that indicated an intentional conduct on the part of either You Kim or Milas (71) Lebedevitch, for that matter there's no evi-

dence put in regard to a breach of duty on the part of Milas Lebedevitch.

The only testimony that was given was with regard to You Kim and the doctor's claim — excuse me — Dr. Gallagher claimed that he breached his duty as a psychologist because he did not come back to her the next day.

Your Honor, first of all, there is no evidence with regard to Milas Lebedevitch as to any breach with regard to his instructions or non-instructions; secondly, malpractice is still a tort. It does not rise to an intentional act.

On that basis I am going to have to direct the Court again to the case of Fuhrman, the new slip opinion, and ask that with regard to the allegations of outrageous conduct, all of the Defendants named in this case be dismissed.

Now, that leaves the area of defective building statute with regard to the County of Wayne. Your Honor, I ask the Court to again look at the cases I cited to it, to the Court on Thursday, including the Vargo case and the case of Snydowski, that was 70 Mich 545 and the Vargo case, 100 Mich App 809. Both cases are in direct agreement to the Bush holding with regard to the necessity of a physical defect being present in the use of a building or a structure in order for liability to attach to the governmental entity.

(72) It is Defendant's position, Defendant Wayne County's position there's absolutely no showing whatsoever of structural defect, physical defect with regard to that jail because, as Mr. Greenstone stipulated on the record, we have absolutely no problem with the engineering aspect of that jail.

What they're saying is it was used improperly.

Number one, the County didn't direct the use of those three cells in the jail; the Circuit Court did.

Secondly, the County didn't implement the orders of the Circuit Court; the Wayne County Sheriff did.

The County did what it was supposed to, it provided a building free from defects. Plaintiffs have put absolutely no evidence in with regard to defect of a building save a minor toilet problem in that jail cell that Linda Rushing was in and in that instance there was absolutely no indication that that made the place uninhabitable or, in fact, Linda Hartley Rushing claimed to be injured or, in fact, was injured as a result of a leaking toilet.

The argument in Bush, and I think I will tell this Court right now, I simply do not understand Lockaby after a good ten to fifteen readings of it. I will (73) tell the Court also one of the judges sitting in the district court here right now who was a prior research clerk for Justice Levin in fact told Mr. Becker and myself in chambers that Lockaby really means nothing. Lockaby is a reiteration of the prior cases that existed. Those prior cases are Bush vs Oscoda Schools. The Snydowski case in fact is a reiteration of those cases in Vargo and everyone of these cases, Your Honor, says you have to have a physical defect and that defect has to contribute to the injury and the use.

The allegation of Plaintiff's as the Court has noted are a unique claim, Your Honor. They are so unique, they're not based on any law in this State and on that basis, because there has been in fact no evidence offered or alleged that there was in fact a physical defect that injured the Plaintiff in this instance, then we move that the County of Wayne should be dismissed with regard to the physical defect exception to the governmental immunity statute. Thank you.

THE COURT: All right. Who wishes to reply?

MR. BECKER: Your Honor, I would like to reiterate the arguments made yesterday. In response I believe

most of the arguments of Mr. Kudla have been redundant in the sense they were made previously.

He did indicate two invasion of privacy (74) cases which happened to be the two cases I cited. I don't know if Mr. Kudla read those cases ten times as he has Lockaby. He has not indicated in here to the Court in both of these cases cited there were findings in favor of the Plaintiff on facts very similar to our case.

In the Forts vs Ward case which I will be happy to provide to the Court, the Court indicated it was a violation of female rights of privacy to have male guards assigned to walk in or to flash a flashlight into her cell without warning to see if she was there without any advance awareness if she was using the toilet or not, her garments were disarrayed or cast aside.

Hudson vs Goodlander case was further a finding in favor of the Plaintiff where there was a statement that the inmate's privacy rights were violated by assignment of female guards to posts where they would view him while he was completely unclothed.

Do you want those cases?

THE COURT: Forts vs Ward and the Hudson case on the violation of right of privacy has to do with whether her rights were violated as a result of the activity of the Sheriff or of some individual working for an administration agency or an agency created by law but not as in this case by the County. The County couldn't send anybody in there with a flashlight or did the County send anybody in there with a broom (75) to lean on it and observe the female form of the Plaintiff in this case?

MR. BECKER: Your Honor, it is our position and it has been our position that the County of Wayne is responsible for what happens in the Wayne County Jail, that the deputy sheriffs answer to the County of Wayne, that Sheriff Lucas is not responsible for what a deputy does.

There is a statute which so indicates that. If I had sued or Mr. Greenstone had sued Sheriff Lucas under the facts of this case, Sheriff Lucas could have been immune from suit in this case.

There is a case, Your Honor, Boyer vs Almstead, 29 Mich 171. In that case the Sheriff was sued but not the County. This was during the interpretation of governmental immunity, a 1970 decision when all counties and cities were held immune as to everything.

THE COURT: Let me interrupt. I agree with what you're saying about the Sheriff. I have no fault with that.

What I am trying to get somebody to explain to me is, first of all, I think that Bush and Vargo are cases that state exactly what they state about physical defects. I think that Lockaby stands for exactly what it said it stood for.

Now, regardless of what the Court [76] clerk might think or the clerk of Justice Levin might think, I at the present time —

MR. BECKER: I don't concur with that at all. I don't know where that came from.

THE COURT: That's not an argument. I am commenting on it because, you know, whoever reads Lockaby has to read it as to what happened and can't be guided by what some lawyer or some clerk might think of it as it relates to his discussion of it with the justice that may have had some input into the writing of it. It certainly, if that were to happen, we would follow that kind of reasoning, we would be in never-never land.

But, be that as it may — go ahead. I don't want to cut you off.

MR. BECKER: I would like to get to the bottom of it. It's been frustrating to me to no end.

The Sheriff, there's a constitutional provision which was addressed in Lockaby and after Lockaby, I mean if we are talking about conversations with clerks, I tried a

case against the County of Wayne. They were found liable. Be that as it may, Lockaby addressed that constitutional provision and it said the Sheriff, the Sheriff and that constitutional provision, doesn't say anything about a janitor or deputy, Sheriff. It's saying the Sheriff will not, that the County will not be liable for the acts of the Sheriff and that (77) is not involved here.

We never claimed that Sheriff Lucas did anything wrong.

We are saying if you work for Ford Motor Company and you happen to work for the Mercury Division, it is not the Mercury Division that you sue, it is Ford Motor Company even though the Mercury Division, you can get the executive in.

We have complete autonomy. That's all these people are saying here.

It is a complete sham and it is a farce when you look at the Lockaby case because there every justice said the County of Wayne would be liable, every single justice.

We disected Lockaby a few times in this case. Everyone said the County of Wayne would be liable for the intentional acts of the deputy, guards and other unknown people.

In that regard the County would be liable, they said the County would be liable in that case.

They looked at that constitutional provision. The attorney representing the County of Wayne at that time worked for the same corporation council's office as in this case and that argument was made. It was Mr. Dave Currin, I'm positive. We talked about that case and that is (78) what it says.

Now, there is a case, Butler vs Wayne County Sheriff that I alluded to that is where a Sheriff sued Wayne County Sheriff's Department and the Court of Appeals said no immunity under the facts of the case.

It is our position, you know, if we are going to argue posteriorly, we will argue posteriorly. I, for the life of me, I do not understand how the Lockaby decision would be any clearer than what it is in terms of the County of Wayne. If they came in and said the Sheriff was somehow involved in this incident, that he was the wrongdoer, they might have a point but, Your Honor, it is our position, our irrevocable decision and our position in this case that the County of Wayne is the employer of the Defendants in this case.

As the Court knows, it has been stipulated to by Milas Lebedevitch and You Kim employees of the County of Wayne. They're not employees of the Sheriff's Department. There's been no testimony whatsoever Sheriff Lucas directed, advised, counseled these men on how to perform their respective psychological and psychiatric services. Nothing in this case whatsoever to intimate those possibilities.

So, it is our position that the County of Wayne is the responsible party and not Sheriff Lucas because he, by statute, is not liable for the acts of deputies (79) in his employ and case law, there is no case anywhere in the world, let alone the State of Michigan, indicating that a sheriff, merely because he hired somebody, is responsible if that guy goes out and hits somebody over the head.

If you train that guy inadequately, that's another thing. Just because you hire that man doesn't make him responsible. There is plenty of case law if you employ a man, he's working for you, gets his paycheck from you, gets his paycheck every week, says the County of Wayne, if he asks them where he works, he works for the County of Wayne, if the County of Wayne doesn't give him money, he doesn't get money from the Sheriff.

They have control over him. It is like the public, as though they have control over him.

If a person is injured in the jail it is the County of Wayne they think is the one responsible. There is even a case, Thomas vs Checker Cab where somebody was injured in a Checker cab and they weren't even in the Checker cab. They were in another car. Because it said Checker cab on the outside, they sued Checker cab and the Court said that was sufficient, they relied on that representation it was the Checker Cab Company even though it turned out Checker Cab is just a structure and they have individual owners of that particular cab.

So, Your Honor, I feel that the (80) case law is completely unambiguous. Where the Sheriff is not directly involved in it, it is not the Sheriff's responsibility and, Your Honor, the sad part about it and ironic part is if somehow we claimed that it was the Sheriff, that it was his responsibility and did not sue the County of Wayne, that the Sheriff would be in here saying I know nothing about how the psychiatrist and psychologist run things. How do I know what the custodian does or doesn't do?

We are suing Wayne County. It is equivalent to suing General Motors even though it was a Chevrolet involved and not suing Chevrolet.

I made our position clear I feel and that is our position.

Now, that's one issue that was addressed. There have been other issues addressed. There has been statements made there's no testimony that, there's no testimony according to Mr. Kudla the lack of dilantin caused her any problems whatsoever and the transcript of Dr. Cantow which we have ordered, on page 72, line 25, the question was asked: Assume as true that approximately 72 hours went by between the time she entered the jail and the time she received her dilantin and her anti-convulsive medication, what effect if any in your opinion, based upon your treatment of this woman, would that have had on her psychological state?

The answer: She was aware and knew (81) that she should have her medication, that the medication was important for her. I would view this to her experience as another abandonment, you know, authorities are not doing what they're supposed to do. They don't care.

Certainly, Your Honor, he indicated a psychological effect of the lack of dilantin.

We have never indicated, Your Honor, she had a seizure in the jail or lack of dilantin caused a seizure, never had any testimony by way of deposition or what have you regarding that.

Your Honor, I think most of the other things were covered yesterday. I don't want to repeat myself.

THE COURT: I think I have a good knowledge of the entire situation.

* * *

(82) * * * THE COURT: The Court has listened to, approximately, six weeks of testimony in this matter. The Court has heard numerous motions and arguments, particularly motions for summary judgment as to the County and to You Kim and Milas Lebedevitch. As to those two, I will at this time deny summary judgment and, also, deny a directed verdict.

The Court understands that the County of Wayne has not specifically been involved in any violation of the civil rights of the Plaintiff in this matter. The County of Wayne has an obligation to build and see that a jail is maintained within the County.

The County, in this Court's opinion, has not intentionally inflicted any tortious conduct upon the person of Linda Hartley Rushing.

The Court is aware of the Bush and Vargo cases among other things. The Court understands the (83) defense Counsel states the cases state that any defects have to be physical defects.

The Court is aware the findings of Forts vs Ward, that's the violation of right of privacy, and all of these cases, of course, I can't help but agree with what you are saying, Mr. Kudla. But, first of all, you have to look at the facts that the Plaintiff in this case, as it relates to the County of Wayne, stated that the cell in which the Plaintiff was placed, and he states this in paragraph 11 of his Complaint, the cell in which the Plaintiff was placed was defective for its purpose in housing unclothed inmates who are in a confused, anxious and depressed condition, and that Mrs. Rushing was forced by the Defendants Kim and Lebedevitch, paragraph eight, he states, who were acting pursuant to their employment relationship with the Defendant to be needlessly disrobed and remain disrobed in a prison cell for several days except for some small panties.

Now, the Court in the case of Martin Fuhrma and Karen Fuhrma vs Charles Hattaway stated that the standard for review of summary judgment based on GCR 1963, 117.2(1) is well established.

In citing this subrule the Defendant charged that the Plaintiff's Complaint failed to state a claim upon which relief may be granted. The motion challenged the legal sufficiency of the Complaint and must be evaluated (84) with reference to the context of the Complaint alone and all well-pleaded allegations of facts must be taken as true. The proper inquiry is whether the claims made are so clearly unenforceable as a matter of law, that no factual development thereunder could possible justify a right to recovery.

They cite Crowther vs Ross Chemical and Manufacturing Company, 42 Mich Ap 426.

They went on to state an analyses of the substantive issues in the case must be prefaced by noting that a burden rested upon the Plaintiff to plead facts in avoidance of governmental immunity. Butler vs Wayne County Sheriff's Department.

They went on to show in this case that the State mental hospital is cloaked in governmental immunity.

In the instant case the Plaintiff not only sets forth in her Complaint the items or the information, allegations that I just quoted from but they also have at this juncture completed all of the testimony in which they brought witnesses here to testify before the triers of the facts. They have submitted testimony to the fact that as a result of being disrobed Ms. Rushing suffered great mental anguish and trauma and a psychotic condition resulted and she was diagnosed as an acute, very acute psychotic individual by the doctors who disrobed her.

(85) We have the testimony of her condition before this incident, her condition and behavior afterward.

The statements of Dr. Gendernalyk and Dr. Cantow and we talk and apply the constitutional requirements for the County to provide citizenry with a jail and then we took a look at Lockaby where, as you state, Mr. Kudla, it may be an aberration and it may be something that may go away but I would quote to you from that case. The Court stated that the Lockaby Complaint states a claim against Wayne County under the public buildings exception to the governmental tort liability act. In providing this exception to governmental immunity the legislature intended to protect the general public from injury by imposing upon governmental agencies the duty to maintain safe public places. They cite Pichette vs Manistique Public Schools, 403 Mich 268.

They went on to state the question of whether a part of a building, in this case namely a jail cell is dangerous or defective is to be determined in light of the uses or activities for which it is specifically assigned, in this case a cell for mental cases.

They went on to state although the Sheriff may not be held responsible for the acts, defaults and misconduct in

office of any deputy sheriff, he is responsible for his own personal acts of negligence and may be responsible (86) under the doctrine of respondeat superior for the tortious acts of employees who are not deputies.

Under Note 6 it states governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damages resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

In their final paragraph they state while the governmental tort liability act does not provide any immunity to governmental officials, the common law has recognized that governmental officials have a limited immunity.

Of course, as you pointed out, Mr. Kudla, so succinctly this case has not been tried. It went all the way up on the basis of a summary judgment action.

I note that Justice Coleman in that opinion concurred in part and dissented in part. Quoting from MCLA 691.1406 she stated that governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property (87) damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

Quoting from Bush vs Oscoda Area Schools which you succinctly reminded the Court they use the language, logic compels the conclusion that a building or cell is to be used in accordance with the purpose for which it was designed and constructed and that while the failure to do that may amount to negligence on the part of the user, it surely does not constitute a building defect.

Now, in the instant case the County, has the duty to build and maintain a jail, the Sheriff actually administering and operating the jail, in this case a portion of that jail was set aside for mental purposes, that is for patients, particularly in a specific area in which she was placed. The cell was set aside for those with suicidal intentions, the intent to commit suicide and one of the things that was essential under the orders of the court was that those suicidal persons should be placed in specific types of cells that would warrant their being incapable of perpetrating and committing suicide.

In this instance that was an (88) excellent idea and one, an activity, to be hoped to continue to be improved upon but there is also the question that this individual, Ms. Rushing, who was placed in that cell in accordance with the allegations in the Complaint stated by her she was entitled to a certain amount of privacy and, although it may have been necessary to strip her in order to prevent that suicide, the jail was defective according to her Complaint in failing to provide a cell that was not created in such a way, constructed in such a way that it improperly exposed her to people of the opposite sex and even people of her own sex or to any visiting males upon the premises.

Granted, this may be an area where the courts, the appellate courts have not necessarily progressed to that point insofar as the County had a duty to provide a jail that would not expose someone in a ward such as 411.

I am going to hold the County in this case and deny your motion as to that particular obligation on the part of the County as was enunciated by applying the law and the interpretation of Lockaby and for that matter Bush and Vargo and the rest of them. If you take the logic that the Supreme Court had in talking about people in mental conditions having mental problems, talking about, for example, even in schools when they are built in such a way that their use requires certain activities on the part of those that administer the jail and it is incumbent upon the jail to have a (89) jail built that would provide that these people not be exposed.

That, really, basically is what Lockaby would say if you applied that law.

I know that Mr. Kudla, that you probably disagree and I can understand why you disagree but, nevertheless, it is my opinion that I am going to leave the County in there for that limited purpose as I explained in chambers.

Do you understand that, Mr. Becker?

MR. BECKER: I think so, Your Honor.

THE COURT: Mere allegations simply state that she was improperly exposed and the building was defective, as a result because the building was defective she was improperly exposed. That is the only basis that I can allow the County to remain in there.

MR. BECKER: Yes, I understand.

THE COURT: Well, I strongly urge that you in arguing to the jury, you keep in mind that is the limited purpose for which the County remains a Defendant in this matter.

MR. KUDLA: Your Honor, if I may, do I understand the Court to say that with regard to all of the other allegations in his Complaint, the Court is granting Defendant's motion with regard to Defendant Wayne County?

THE COURT: With Wayne County I am (90) granting the other portions of your motion. As to the —

MR. KUDLA: The building defect aspect?

THE COURT: The building defect for the use remains in for that purpose.

MR. KUDLA: Thank you, Your Honor.

(Where upon the proceedings were concluded.)

AMENDED COMPLAINT

(State of Michigan — Circuit Court — County of Wayne)

(Filed May 30, 1978)

(LINDA HARTLEY RUSHING, HELEN HARTLEY and LARRY HARTLEY, Plaintiffs, -vs- DANIEL KNEPP, CITY OF DETROIT (Detroit Police Department), COUNTY OF WAYNE (Wayne County Sheriff's Department), YOU KIM and MILAS LEBEDEVITCH, Jointly and Severally, Defendants — CIVIL ACTION NO. 77 724 529 NZ)

NOW COME the plaintiffs, LINDA HARTLEY RUSHING, HELEN HARTLEY and LARRY HARTLEY, by and through their attorneys, PETER R. BARBARA and ASSOCIATES, P.C. and file this Amended Complaint as follows:

COUNT I

1. Plaintiff LINDA HARTLEY RUSHING is a resident of the City of Detroit, County of Wayne and State of Michigan.

2. Plaintiff HELEN HARTLEY is a resident of the city of Keleva, State of Michigan.

3. Plaintiff LARRY HARTLEY is a resident of the city of Garden City, County of Wayne and State of Michigan.

4. At all times mentioned herein, defendant CITY OF DETROIT was a Municipal Corporation, and the DETROIT POLICE DEPARTMENT was and still is a division of the City of Detroit.

5. Defendant DANIEL KNEPP is a resident of the City of Detroit, County of Wayne and State of Michigan, and at all times herein was employed by the City of Detroit as a police officer, and at all times herein was acting within the scope of his employment with the City of Detroit.

6. The defendant *COUNTY OF WAYNE* is and at all times herein was a Governmental Corporation and the Wayne County Sheriff's Department was and still is a division of the County of Wayne.

7. Defendant YOU KIM, upon information and belief, was and is a resident of the County of Wayne, and at all times mentioned herein was and still is employed by said County, specifically by the Wayne County Sheriff's office in the capacity of a social worker dealing with emotionally disturbed prisoners who are in the custody of the Wayne County Sheriff, and at all times herein was acting within the scope of his employment for the County of Wayne.

8. Defendant MILAS LEBEDEVITCH was and is, upon information and belief, a resident of the County of Wayne, and at all times herein mentioned was and still is employed by the defendant County of Wayne, as a psychiatrist or psychologist dealing with emotionally disturbed prisoners in the custody of the Wayne County Sheriff, and at all times herein was acting within the scope of his employment for the County of Wayne.

9. That the amount in controversy on behalf of all the plaintiffs against the defendants exceed[s] the amount of Ten Thousand ($10,000.00) Dollars.

10. That on or about June 4, 1976, defendant DANIEL KNEPP (herein referred to as Defendant KNEPP) intentionally and with malice caused each plaintiff to be imprisoned and otherwise physically restrained against their will as is hereafter related.

11. On information and belief, defendant KNEPP was investigating a murder and one of the suspects in the murder was one Chester Hartley, a blood relative of the plaintiffs herein.

12. That defendant KNEPP harrassed and intimidated plaintiffs for information connecting said Chester Hartley to the alleged murder. As part of his harrassment and intimidation, said defendant KNEPP wrongly and falsely accused plaintiffs of harrassing witnesses to the alleged murder and wrongly caused the plaintiffs to be arrested by the Detroit Police Department. Plaintiffs were consequently caused to be forcibly incarcerated at the Wayne County Jail, all due to defendant KNEPP's wrongful activities.

13. That at defendant KNEPP's instigation, the plaintiffs were arraigned in court and charged with the crime of obstructing justice. Defendant KNEPP had no probable cause to make such a charge, and to the contrary, said charge was made without probable cause and with malice by defendant KNEPP. The cases against each plaintiff were eventually dismissed by a Judge because the prosecution had no probable cause to make such charges.

14. Plaintiff LINDA HARTLEY RUSHING was hollered at, berated and accused, as well as intimidated, by defendant KNEPP. Defendant KNEPP subsequently caused her to be forcibly confined in the Wayne County Jail for at least four (4) days, from approximately June 4, 1976 through June 10, 1976, on a groundless charge of obstruction of justice.

15. Plaintiff LINDA HARTLEY RUSHING was forced by defendants YOU KIM, who upon information and belief, was a social worker, for the County of Wayne, and MILAS LEBEDEVITCH, who upon information and belief, was either a psychologist or a psychiatrist for the County of Wayne, acting in their respective positions of authority, to remain disrobed in her prison cell for several days, unclothed except for underclothing. Some of that time was spent in the view of other women and

in the view of several male employees of the Wayne County Sheriff's Department, much to the embarrassment, indignity and humiliation of the plaintiff LINDA HARTLEY RUSHING. The response by defendants to plaintiff's repeated requests for clothing, or her requests to be taken from the view of others was met with alternate apathy, or in the case of requests to several employees of the Wayne County Sheriff's Department, by laughter or abusive language. Further, plaintiff was denied her customary dosage of medication for her epileptic condition while in confinement.

16. That plaintiff LINDA HARTLEY RUSHING was forced by defendant KNEPP's actions to place her sick infant child in the custody of a third party due to said incarceration, along with threats by defendant KNEPP that he, KNEPP, was going to place the child in a foster home during her incarceration.

17. That defendant KNEPP had no reasonable suspicion and no probable cause to believe that plaintiff, LINDA HARTLEY RUSHING, was in any way involved with or had any knowledge of the aforesaid alleged murder, and he had no reasonable suspicion or probable cause that she had harrassed any witnesses to the alleged murder or done anything to obstruct justice. Plaintiff LINDA HARTLEY RUSHING, to the contrary, repeatedly told him that she knew nothing of a murder, and she denied harrassing any witnesses or obstructing justice in any manner and yet, defendant KNEPP, without probable cause wrongfully, intentionally and maliciously persisted to harrass, intimidate and imprison LINDA HARTLEY RUSHING on a charge of obstruction of justice, which charge was subsequently dismissed by a court because the charge lacked probable cause.

18. That YOU KIM and MILAS LEBEDEVITCH were guilty of general negligence and malpractice in their

respective professions in that they deviated from the existing standard of practice of psychologists, psychiatrists, and social workers by subjecting plaintiff, a known epileptic, and a woman whom said defendants believed to be very depressed, anxious and suicidal, unclothed, except for her underwear in an open cell, where plaintiff could be viewed by others, and said defendants YOU KIM and MILAS LEBEDEVITCH also departed from the standard of practice for psychologists, psychiatrists and social workers by leaving plaintiff in said cell in said unclothed condition for an extended period of time when defendants knew or should have known that plaintiff constantly and hysterically begged to either be removed from the view of others while she was in such an unclothed state, or she continuously begged for clothing to shield herself from the view of others. By breaching their respective standards of care, defendants KIM and LEBEDEVITCH caused mental trauma to plaintiff as hereinafter related.

19. Said defendants YOU KIM and MILAS LEBEDEVITCH, had a duty to arrange for plaintiff LINDA HARTLEY RUSHING, while she was in the above mentally confused and ansious, depressed, suicidal state, seclusion from the view of others and/or to place plaintiff in a psychiatric ward under humane and closely supervised conditions out of the view of others who would increase her anxiety by their viewing her in such an unclothed state in order to eleviate [*sic*] her severe anxiety which the defendants knew of or should have known of.

20. That the above mentioned actions of the defendants, DANIEL KNEPP, THE CITY OF DETROIT, COUNTY OF WAYNE, YOU KIM and MILAS LEBEDEVITCH were not only negligent and unprofessional, but were wilful, intentional, wanton, malicious and proximately caused plaintiff, LINDA HARTLEY

RUSHING to suffer embarrassment, humiliation, trauma, indignity, inconvenience, denial of social pleasure, mental anguish, aggravation of pre-existing anxiety syndrome, aggravation of a pre-existing epileptic condition, anxiety, and fear, said mental conditions being of a permanent nature.

21. That plaintiff HELEN HARTLEY was wrongfully arrested by defendant KNEPP, and was caused by him to be incarcerated for at least four (4) days in the Wayne County Jail, from approximately June 4, 1976 through June 8, 1976, on a groundless charge of obstruction of justice.

22. That despite repeated protests by HELEN HARTLEY of a lack of knowledge of a murder or her son's alleged connection with one and denial by her of any harrassment of witnesses to the alleged murder, or any obstruction of justice, defendant KNEPP caused said plaintiff HELEN HARTLEY to be forcibly arrested and wrongfully charged with the crime of obstruction of justice, which charge as above indicated was subsequently dismissed by a court for lack of probable cause.

23. That defendant KNEPP had no reasonable suspicion or probable cause that plaintiff HELEN HARTLEY was in any way involved with or had any knowledge of the aforesaid alleged murder and had no probable cause that she had harrassed any witnesses to the alleged murder, or had done anything to obstruct justice. However, defendant KNEPP wrongfully and intentionally and maliciously persisted in harrassing, intimidating and imprisoning plaintiff HELEN HARTLEY, as well as maliciously and without probable cause charging her with a crime of obstruction of justice, which charge was subsequently dismissed by a court for lack of probable cause.

24. That the action of defendant KNEPP with respect to plaintiff HELEN HARTLEY, was wilful, intentional,

wanton and malicious, as well as unprofessional, and proximately caused plaintiff HELEN HARTLEY to suffer embarrassment, humiliation, trauma, indignity, inconvenience, denial of social pleasure and mental anguish and anxiety along with fear, said mental conditions being of a permanent nature.

25. That plaintiff LARRY HARTLEY was wrongfully arrested by defendant KNEPP and caused by KNEPP to be incarcerated for at least four (4) days, from approximately June 4, 1976 through June 8, 1976, in the Wayne County Jail on a groundless charge of obstruction of justice.

26. That defendant KNEPP ignored repeated protests by plaintiff LARRY HARTLEY, of said plaintiff's lack of knowledge of a murder or of his brother Chester Hartley's involvement in said murder, and he ignored said LARRY HARTLEY's denial of harrassment of any witness to the alleged murder or any obstruction of justice. Defendant KNEPP instead instigated formal charges of the crime of obstruction of justice against LARRY HARTLEY. Such charges were subsequently dismissed by a court of law because they lacked probable cause against plaintiff LARRY HARTLEY. That defendant KNEPP had no reasonable suspicion that plaintiff LARRY HARTLEY, was in any way involved with or had any knowledge of the aforesaid alleged murder, which was being investigated by KNEPP, and lacked probable cause to believe LARRY HARTLEY had harrassed any witnesses to the alleged murder, or had obstructed justice in any way.

27. That the actions by defendant KNEPP toward plaintiff LARRY HARTLEY, were wilful, intentional, wanton, malicious and proximately caused LARRY HARTLEY to suffer embarrassment, humiliation, trauma, indignity, inconvenience, denial of social plea-

sure, mental anguish and anxiety along with fear, said mental conditions being of a permanent nature.

28. That the unprofessional and brutal conduct by defendant KNEPP with respect to each of these plaintiffs was not only unprofessional, but was intentional, wilful, reckless anjd was done with malice and lack of probable cause.

29. That the conduct of the Wayne County employees at the Wayne County Jail was wilful, unprofessional, intentional and done with malice against plaintiff LINDA HARTLEY RUSHING.

30. That the charges of obstruction of justice brought against each of these plaintiffs at the instigation of defendant KNEPP were all dismissed in a court of law for lack of probable cause; and further, the case against Chester Hartley, the alleged murderer and the subject of defendant KNEPP's initial investigation, was dismissed by a court of law.

WHEREFORE, plaintiff LINDA HARTLEY RUSHING demands judgment against the CITY OF DETROIT, COUNTY OF WAYNE, DANIEL KNEPP, YOU KIM and MILAS LEBEDEVITCH, jointly and severally, in an amount appropriate for whatever plaintiff is entitled to (GCR 1963, 111.1), plus interest, costs and attorney fees;

In addition to compensatory damages, plaintiff LINDA HARTLEY RUSHING requests an award against all the defendants, jointly and severally, for exemplary or punitive damages flowing from the malicious, wilful and wanton behavior displayed by the defendants in their conduct toward plaintiff complained of herein.

WHEREFORE, plaintiff HELEN HARTLEY demands judgment against DANIEL KNEPP and THE CITY OF DETROIT, a municipal corporation (Detroit Police Department), for whatever amount plaintiff is entitled

to (GCR 1963, 111.1), plus interest, costs and attorney fees;

In addition to compensatory damages, plaintiff HELEN HARTLEY requests an award against DANIEL KNEPP and THE CITY OF DETROIT, for exemplary or punitive damages flowing from the malicious, wilful and wanton behavior displayed by the defendants in their conduct toward plaintiff complained of herein.

WHEREFORE, plaintiff LARRY HARTLEY demands judgment against DANIEL KNEPP and THE CITY OF DETROIT, a municipal corporation (Detroit Police Department), for whatever amount plaintiff is entitled to (GCR 1963, 111.1), plus interest, costs and attorney fees;

In addition to compensatory damages, plaintiff LARRY HARTLEY requests an award against DANIEL KNEPP and THE CITY OF DETROIT, for exemplary or punitive damages flowing from the malicious, wilful and wanton behavior displayed by the defendants in their conduct toward plaintiff complained of herein.

COUNT II

PLAINTIFF LINDA HARTLEY RUSHING SAYS AS FOLLOWS:

31. Plaintiff repeats and realleges Paragraphs 1 through 30 of Count I of this Amended Complaint, with the same force and effect as though set forth herein in full.

32. That the defendants DANIEL KNEPP, and THE CITY OF DETROIT, a municipal corporation (Detroit Police Department), COUNTY OF WAYNE, a governmental corporation (Wayne County Sheriff's department), YOU KIM and MILAS LEBEDEVITCH, being respectively Detroit Police Officers and/or Wayne County Sheriffs or employees of the City of Detroit and

the County of Wayne, while acting within the scope of their respective employment and while acting under the color of the statutes, ordinances, regulations and customs of the State of Michigan, County of Wayne, City of Detroit, subjected plaintiff LINDA HARTLEY RUSHING to the deprivation of her rights, privileges and immunities which were secured by the Constitution and the laws.

33. That the said defendants DANIEL KNEPP, THE CITY OF DETROIT, COUNTY OF WAYNE, YOU KIM and MILAS LEBEDEVITCH, deprived plaintiff LINDA HARTLEY RUSHING of the full and equal benefit of all laws and deprived plaintiff of her due process right to the full enjoyment of life, liberty and property, and invaded plaintiff's constitutionally protected right of privacy.

34. That 42 USC 1983 provides for civil liability for the deprivation of any rights, privileges and immunities secured by the Constitution and the Laws.

35. That the defendants DANIEL KNEPP, THE CITY OF DETROIT, COUNTY OF WAYNE, YOU KIM and MILAS LEBEDEVITCH, being Detroit Police Officers or employees of the County of Wayne (Wayne County Sheriff Department), and while acting within the scope of their employment throughout all allegations mentioned herein are civilly liable to the plaintiff pursuant to 42 USC 1983 as the above stated actions of the defendants subjected the plaintiff to a deprivation of her rights, privileges and immunities secured by the Constitution and the laws.

WHEREFORE, and for all of the damages and injuries alleged hereto, plaintiff LINDA HARTLEY RUSHING demands judgment against the defendants, DANIEL KNEPP, THE CITY OF DETROIT, (Detroit Police Department), COUNTY OF WAYNE (Wayne County Sheriff's

Department), YOU KIM and MILAS LEBEDEVITCH, jointly and severally, in an amount appropriate for whatever plaintiff is entitled to, plus interest, costs and attorney fees;

In addition to compensatory damages, plaintiff LINDA HARTLEY RUSHING requests an award against each of the defendants, jointly and severally, for exemplary or punitive damages flowing from any and all rights invaded by the defendants pursuant to 42 USC 1983 together with interest, costs and attorney fees.

COUNT III

PLAINTIFFS LARRY HARTLEY AND HELEN HARTLEY SAY AS FOLLOWS:

36. Plaintiffs repeat and reallege Paragraphs 1 through 30 of Count I and Paragraphs 31 through 35 of Count II of this Amended Complaint, with the same force and effect as though set forth herein in full.

37. That the defendant DANIEL KNEPP and THE CITY OF DETROIT (Detroit Police Department), while acting under the color of the statutes, ordinances, regulations and customs of the State of Michigan, County of Wayne, City of Detroit, subjected the plaintiffs HELEN HARTLEY and LARRY HARTLEY to the deprivation of their rights, privileges and immunities secured by the Constitution and the Laws.

38. That the defendants deprived plaintiffs HELEN HARTLEY and LARRY HARTLEY of the full and equal benefit of all laws and deprived plaintiffs of their due process right to the full enjoyment of life, liberty and property, and invaded plaintiffs' constitutionally protected right of privacy.

39. That 42 USC 1983 provides for civil liability for the deprivation of any rights, privileges and immunities secured by the Constitution and the Laws.

WHEREFORE, and for all of the damages and injuries alleged hereto, plaintiffs HELEN HARTLEY and LARRY HARTLEY demand judgment against the defendants DANIEL KNEPP and THE CITY OF DETROIT (Detroit Police Department), jointly and severally, in an amount appropriate for whatever plaintiffs are entitled to, plus interest, costs and attorney fees;

In addition to compensatory damages, plaintiffs HELEN HARTLEY and LARRY HARTLEY request an award against defendants DANIEL KNEPP and THE CITY OF DETROIT, for exemplary or punitive damages flowing from any and all rights invaded by the defendants pursuant to 42 USC 1983 together with interest, costs and attorney fees.

PETER R. BARBARA and ASSOCIATES, P.C.
BY: /s/ ARTHUR GREENSTONE (P14347)
Attorney for Plaintiffs
2268 City National Bank Building
Detroit, Michigan 48226

ORDER REGARDING SHERIFF'S SUICIDE PREVENTION PLAN

(State of Michigan — Circuit Court — County of Wayne)

(Filed March 18, 1976)

(WAYNE COUNTY JAIL INMATES, MICHAEL HARRIS, JAMES JOHNSON, LAWRENCE ROBERT PLAMONDON, NORMAN RICHARDSON, CAROLYN TRAYLOR, and NORA WARE, individually and on behalf of all other persons similarly situated, Plaintiffs, v WAYNE COUNTY BOARD OF COMMISSIONERS; ROSCOE L. BOBO, Chairman of the Board; WILLIAM LUCAS, Sheriff of Wayne County; FRANK WILKERSON, Administrator of the Wayne County Jail; TED MROZOWSKI, LEONARD D. PROCTOR and RICHARD T. KELLY, members of the WAYNE COUNTY BOARD OF AUDITORS, and LOUIS H. FUNK, Wayne County Treasurer, Defendants — CIVIL ACTION No. 71-173217-CX; JUDGE VICTOR J. BAUM (No. P-10556); JUDGE JOHN D. O'HAIR (No. P-18432); JUDGE THOMAS J. BRENNAN (No. P-11173))

At a session of said Court held in the City-County Building, City of Detroit, Wayne County, Michigan, on March 18, 1976.

PRESENT: HONORABLE VICTOR J. BAUM, HONORABLE JOHN D. O'HAIR, HONORABLE THOMAS J. BRENNAN, Circuit Judges.

Pursuant to this court's order of June 19, 1975, the Sheriff filed a plan for the prevention of suicide, and amended it several times. Plaintiffs made objections in the form of a letter to the Sheriff's plan. An evidentiary hearing was conducted. Oral argument was heard. Briefs submitted by the parties were studied by the court. This court, on March 1, 1976, filed its written opinion.

As provided in the opinion,

IT IS HEREBY ORDERED, as follows:

1. In addition to the wards to be altered as shown in the Sheriff's plan of October 14, 1975, safeguarding alterations shall be made as follows:

(a) Ward 611, or any other comparable ward, used for disciplinary purposes;

(b) At least seven dormitory wards;

and

(c) At least one ward, having at least 10 individual cells.

2. The type of alterations to be made in cells, which are to be safeguarded against suicide, shall be as follows: In individual cells, all horizontal bars are to be removed. All overhead pipes, cell-locking mechanisms and horizontal members shall be covered so as to make it impossible to tie a sheet, clothing or similar articles to overhead pipes, locking mechanisms, or any other horizontal members. In dormitory wards, overhead pipes, locking mechanisms and other horizontal members shall be covered so as to make it impossible to tie a sheet, clothing or similar articles to them. However, horizontal bars on dormitory wards shall not be removed. Provided, further, that it shall not be necessary for the Sheriff to cover any portion of any cell in the Clinton Street facility with safety glass.

3. The Sheriff and the Board of County Auditors shall immediately alter cells as provided in this order. The Board of Commissioners shall forthwith appropriate the funds which are reasonably necessary to carry out such a program. The Board of Auditors shall approve such payments as may be reasonably necessary to carry out the cell alteration program, and the

County Treasurer shall pay such moneys as may be reasonably necessary to carry out such program.

4. The Sheriff shall experiment with at least 10 bed sheets of the type presently in use, by perforating them to determine whether they will withstand the weight of a man's body after perforation, and the Sheriff shall launder such sheets repeatedly to determine how well they withstand laundering. The Sheriff shall file a written report of the experiment within 90 days, which may be included in a quarterly report.

5. The court approves the plan of the Sheriff respecting provision of eating utensils to suicidal and emotionally disturbed inmates, as set forth in the Sheriff's communication of October 14, 1975. The defendants shall implement such plan forthwith.

6. The court approves the Sheriff's plan respecting the use of specially designed safety razors, as set forth in the Sheriff's communication of October 14, 1975. The defendants shall implement such plan forthwith.

7. The court approves and orders implemented the following:

(a) That portion of the Sheriff's plan of October 14, 1975, which provides for classification of all inmates as non-suicidal, potentially suicidal, and potentially suicidal, acute; and

(b) That portion of the Sheriff's plan which provides for suicide classification recommendations to be made by psychiatric social workers and to be reviewed by a psychologist.

8. The Sheriff is directed, immediately, to take appropriate steps, in good faith, to fill the vacancy which exists in the position of psychiatric social worker. The Board of Commissioners shall appropriate

the funds reasonably necessary to pay the salary for this position. The Board of Auditors shall approve disbursement of such funds, in the form of periodic salary payments to the person employed. The Treasurer shall pay such salary when the position is filled. In the event that the Sheriff is unable to fill the vacant position because of a lack of cooperation from the Wayne County Civil Service Commission, he shall promptly seek the court's assistance.

9. In the absence of a psychiatric social worker, a nurse may classify an inmate as non-suicidal, potentially suicidal, or potentially suicidal, acute, and may make an appropriate cell assignment to such an inmate. A classification by a nurse with respect to suicidal propensity shall be promptly reviewed by a psychologist.

10. If there is a reasonable doubt whether an inmate should be classified as non-suicidal or potentially suicidal, the inmate shall be classified as potentially suicidal. If there is a reasonable doubt whether an inmate should be classified as potentially suicidal or potentially suicidal, acute, the inmate shall be classified as potentially suicidal, acute.

11. The Sheriff shall, forthwith, with the assistance of the jail psychologist, jail psychiatrist, and psychiatric social workers, prepare written criteria for classifying inmates as non-suicidal, potentially suicidal, and potentially suicidal, acute.

12. Plaintiffs' attorneys shall be furnished a copy of the criteria respecting classification of suicidal propensity before the written statement of criteria is distributed to jail staff. Plaintiffs' lawyers shall be afforded a reasonable opportunity to discuss the statement of criteria with the Jail Administrator before the state-

ment is distributed to jail staff. Plaintiffs' counsel shall have a period of 15 days after the conclusion of such discussion to file written objections to the Sheriff's proposed statement of criteria. Such written objections shall be filed in court and with Tom Downs, Court Monitor. The Monitor shall seek to mediate and adjust differences between plaintiffs' lawyers and the Sheriff. If Monitor Downs is unable, within 90 days after receiving plaintiffs' objections, to adjust differences between the parties, he shall advise the court, and the court will set a date for a hearing concerning the statement of criteria, provided that the hearing may be by less than three members of the judicial panel. It is provided, further, that after plaintiffs' lawyers have concluded discussions with the Jail Administrator, the written statement of criteria, as drafted by the Sheriff's staff, shall be distributed to jail staff and be put into effect, regardless of whether plaintiffs have filed objections.

13. Classification with respect to suicidal tendencies shall not be used as a means of imposing discipline or punishment.

14. A copy of the statement of criteria for classification according to suicidal tendencies shall be furnished to all jail psychiatrists, physicians, nurses, psychiatric social workers, social investigators, psychiatric attendants, medical personnel, RDC personnel, command officers, and guards who have the duty of surveillance of inmates.

15. When any member of the Sheriff's staff observes an inmate who, in the judgment of the observer, clearly and obviously intends, then and there, to take his own life, the staff member shall forthwith take such steps as may appear to him in good faith to be reasonably necessary to prevent the suicide. This shall be done whether

or not such inmate has been classified as potentially suicidal, or potentiallly suicidal, acute. Such steps shall include removal from such an inmate of all clothing, bedding, and other articles or implements which could be used for self-destruction; provided, however, that brief underwear bottoms shall not be removed except when they have been actually used in a suicide attempt or gesture. An article so removed should not be returned to the inmate unless and until the return is ordered by the Sheriff, Under-Sheriff, Jail Administrator, jail psychiatrist, jail psychologist, or jail psychiatric social worker.

16. When clothing, bedding, or other articles or implements are removed from inmates by non-psychiatric personnel, lower in rank than the Jail Administrator, the advice of persons with psychiatric training must be promptly sought respecting the return of some or all of such articles and implements. For purposes of this order, psychiatrists, psychologists, and psychiatric social workers are deemed to be persons with psychiatric training, but social investigators are not. Upon a stipulation of counsel for all of the parties, the person who has the title of Medical Administrator may be considered to be a psychiatrically trained person for purposes of this order.

17. Jail staff members below the rank of Jail Administrator shall be bound by the advice of the person who is psychiatrically trained, except when such advice is overruled by the Jail Administrator, Under-Sheriff or Sheriff.

18. Before ordering the return of articles which have been removed from an inmate, the Sheriff, Under-Sheriff, and Jail Administrator may seek the advice of psychiatrically trained personnel, but are not required

to seek such advice, and are not bound to accept such advice if the advice has been sought.

19. The Sheriff, Under-Sheriff, and Jail Administrator, for good cause, have the authority to overrule any classification respecting suicidal tendency made by a person of lower rank, and shall have the authority to classify an inmate in a manner different than the classification made by psychiatrically trained personnel.

20. The Sheriff shall establish reasonable procedures to prevent premature return of items removed from suicidal inmates.

21. Jail personnel shall not remove clothing, sheets, blankets, shoes, belts, bedding, personal articles and effects, and the like from any inmate for the purpose of disciplining or punishing such inmate, but may remove such articles in order to protect persons in the jail if the article is being used, or is about to be used, by an inmate in an aggressive or dangerous manner.

22. The written instrument, which purports to be a letter dated December 29, 1975, from Elliott Luby, M.D., to Mr. Frank Wilkerson, is stricken from the defendant's brief.

23. The court approves and orders implemented the plan for convening a conference of psychiatric experts, as set forth in the Sheriff's communication of October 14, 1975, except for the material concerning the cost of the conference. In accordance with the oral modification of the Sheriff's plan made in open court by the Jail Administrator, participants in the psychiatric conference will not be paid fees or be reimbursed for their travel and lodging expenses, with the exception of Franklyn L. Wosack, ACSW, of Traverse City, Michigan. Mr. Wosack shall be paid actual and reasonable expenses incurred by him for travel and lodging. Accord-

ingly, the Board of Commissioners shall appropriate funds to pay Mr. Wosack; the Board of Auditors shall approve such payment; and the County Treasurer shall pay the same promptly after completion of the conference.

24. The plaintiffs' attorneys shall be given an opportunity to meet with the conferees and to discuss psychiatric services from the inmates' standpoint.

25. The Sheriff shall invite the Court Monitor, Tom Downs, to participate in all aspects of the conference. A member or members of this three-judge panel will participate in the conference, if possible. The Sheriff shall advise the three-judge panel of all of the conference plans and schedules, well in advance.

26. The Sheriff's plan for the training of jail personnel, as set forth on pages 24 through 36 of the Sheriff's communication of October 14, 1975, shall be examined by the monitor, Tom Downs, who shall study and analyze the same, and report his findings to the court. The monitor shall consider the cost of the program proposed by the Sheriff, the benefits that could be expected from it, and alternative means for accomplishment of the objectives of the court, as those objectives are stated in the court's Interim Opinion, Findings and Order of June 19, 1975.

27. The Sheriff's Alternative Temporary Plan for direct contact visitation, as set forth on page 42 of the Sheriff's communication of October 14, 1975, is approved and ordered implemented except as modified in this order.

28. All inmates who have been classified as potentially suicidal and potentially suicidal, acute, shall be entitled to direct contact visitation with members of their families, unless otherwise ordered, for good cause shown and set forth by the Sheriff in such written order.

29. All persons who have been diagnosed by jail psychiatrists or by a jail psychologist as mentally ill or emotionally disturbed shall be entitled to direct contact visitation with their families, unless otherwise ordered, in writing, by the Sheriff, for good cause shown and set forth in the Sheriff's written order.

30. Requests for direct contact visitation may be initiated by any inmate classified as potentially suicidal or potentially suicidal, acute, and by any inmates who has been diagnosed by a jail psychiatrist or psychologist as mentally ill or emotionally disturbed. Requests for direct contact visitation may be initiated by any member of the family of any such suicidal, emotionally disturbed or mentally ill inmate. Requests for direct contact visitation may also be initiated by medical or psychiatric county jail personnel, RDC personnel, command officer or guard, the Jail Administrator, Under-Sheriff, or Sheriff, or any attorney of any inmate who may be entitled to such visitation under the terms of this order.

31. Before any direct contact visitation takes place, except for direct contact visitation initiated by order of the Sheriff, the Sheriff shall consult the jail psychiatrist, who may recommend against direct contact visitation if, in the psychiatrist's opinion, such a visit would adversely affect the mental or emotional well-being of the inmate. The Sheriff shall have the authority to overrule the psychiatrist's recommendation, in the event the psychiatrist recommends against such visitation. The Sheriff, also, shall have the authority, for good cause shown, to countermand any order for direct contact visitation regardless of its source. In the event the Sheriff countermands an order for direct contact visitation, he shall state his reasons in writing.

32. The jail psychiatrist may recommend direct contact visitation between a mentally ill, emotionally disturbed, or suicidal inmate and a person to whom the inmate is genuinely affianced or with whom the inmate has lived for a substantial period of time. The Sheriff shall have the final decision as to direct contact visitation by inmates and their fiancees or living mates.

33. The physical aspects and arrangements for direct contact visitation shall be as set forth on pages 38 through 40 of the Sheriff's communication of October 14, 1975, except insofar as that communication may be inconsistent with this order.

34. Visitors who arrive at the jail under the influence of alcohol or drugs shall not be permitted to visit inmates. The decision of the Sheriff's staff whether a visitor is under the influence of alcohol or drugs shall be binding.

35. Metal detectors shall be located at the entrance gate for visitors on the first floor of the Clinton Street facility and at the entrance to the chapel. Box lockers shall be provided for the storage of visitors' possessions. Visitors shall not be permitted to carry any packages, boxes, containers or the like into the area where direct contact visitation takes place.

36. Visitors shall be required to submit to a pat search of their persons, as set forth by the Sheriff on page 39 of his October 14, 1975, communication.

37. Direct contact visits shall be for a period of 45 minutes, unless ordered otherwise by the Sheriff or jail psychiatrist. Provided, however, that visits shall be terminated in less than 45 minutes if either the visitor or an inmate so desires.

38. The County Commissioners shall appropriate funds reasonably necessary for the acquisition of metal

detectors and box lockers as described in the Sheriff's plan. The Board of Auditors shall approve payment of the sums reasonably necessary to purchase the same. The County Treasurer shall pay for the cost of acquisition.

39. The provisions concerning surveillance of suicidal inmates, as set forth in this court's Order of June 19, 1975, shall remain in full force and effect until further order.

40. All provisions of prior orders and judgments of this court, which are not clearly inconsistent with the provisions of this order, shall remain in full force and effect.

/s/ VICTOR J. BAUM, Circuit Judge
/s/ JOHN D. O'HAIR, Circuit Judge
/s/ THOMAS J. BRENNAN, Circuit Judge

Dated at Detroit, Michigan,
March 18, 1976.

(2)

No. 90-1020

In The Supreme Court of the United States

October Term, 1990

COUNTY OF WAYNE, MICHIGAN,
Petitioner,

v.

LINDA HARTLEY RUSHING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Should Certiorari be granted where the Petitioner, County of Wayne, is alleging, for the first time in this Court, that it properly implemented jail policies (including a judicially-mandated order), although Petitioner had previously consistently maintained, during all proceedings below, that Petitioner did not establish or implement any jail policies and had no obligation to do so?

   a.) Should the failure of Petitioner to claim heretofore any responsibility for establishing or implementing jail policies be viewed as positive evidence of the Petitioner's failure to establish and implement constitutional jail policies?

   b.) Must this court ignore, as Petitioner has, an appellate determination that the judicially-mandated court orders for the Wayne County Jail were not complied with, and accept Petitioner's belated assertion, in the absence of proof, that it scrupulously observed all court orders?

QUESTIONS PRESENTED FOR REVIEW — Continued

2. Is this the proper case for this court to explore the contours of the right of privacy since Petitioner never argued this issue previously and conceded the existence of this right through its failure to object to jury instructions on this issue and through arguments?

   a.) Based on the facts of this case, was a sufficient showing made to establish a violation of Respondent's constitutional right of privacy?

   b.) Would the granting of Certiorari be an exercise in futility since an adequate and independent basis for the Michigan Supreme Court opinion exists which is unchallenged by Petitioner?

3. Did the Michigan Supreme Court remain faithful to existing precedent which allows governmental liability under 42 U.S.C. § 1983 for customs although the written policies are constitutional?

LIST OF PARTIES

Petitioner is the County of Wayne, Michigan.

Respondent is Linda Hartley Rushing.

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LINDA HARTLEY RUSHING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Respondent, Linda Hartley Rushing, respectfully requests this Court to deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Michigan Supreme Court entered in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported as *Rushing* v *County of Wayne*, 436 Mich 247, 462 NW2d 23 (1990). The Michigan Court of Appeal's opinion is reported at 138 Mich App 121, 358 NW2d 904 (1984).

STATEMENT OF THE CASE

The Petitioner has misstated the total thrust of this case. This case does not concern the disrobing of a suicidal pretrial detainee, but the aftermath: the four (4) days she remained in an open cell unclothed, continually leered at by a mail janitor. The four (4) days she was left naked without any psychiatrist, psychologist, social worker or any professional reviewing her case: denied medication, made to feel like an animal in a zoo, as a group of students were paraded in front of her.

A succinct recitation of facts would include the following: In June of 1976, the Respondent was arrested on a charge that was eventually dismissed at the time of the preliminary examination (Vol. XI, 8). Ms. Rushing entered the Wayne County Jail on Tuesday, June 8, 1976 (Exhibit 3). Her sister,

delivered Dilantin medication which was prescribed for Respondent's epilepsy (Vol. III, 114-115).

A jail social investigator, based on a phone call from a person claiming to be a sister of the Plaintiff, indicating that the Plaintiff had threatened suicide, prepared a document called a "PJ-210" which was received into evidence as Exhibit #3 (Vol. X, 84-86; Vol. XIX, 85). The "PJ-210," stated that Linda Hartley Rushing was "not psychotic, very depressed, frightened and threatened suicide." The PJ-210 further indicated that she should be seen again tomorrow. Based on this report, You Kim, a jail psychologist, ordered that Linda Hartley Rushing be stripped. The Plaintiff was classified as "suicide acute temporary" or "4T".

A person classified "suicide acute temporary," pursuant to the jail manual (Exhibit 4) was supposed to be *reviewed daily by a psychologist* (Vol. VIII, 92, 135). Furthermore, a psychiatrist was obligated, pursuant to the manual, to *personally review the case* (Vol. VIII, 92, 135). Despite this rule, whether a psychiatrist visited with the patient was solely up to the discretion of the psychiatrist, who had sole authority

to determine the quality and extent of the care an inmate received (Vol. VIII, 134, 139, 141).

At this time, the Wayne County Jail was subject to a Court Order which required the jail staff to remove clothing from an inmate who exhibited suicidal tendencies. The Order further provided that when clothing is removed, "the advice of persons with psychiatric training must be promptly sought respecting the return of some or all such articles and implements." (Plaintiff's Exhibits 7, Petitioner's Appendix A-121)

The Plaintiff admittedly was *not* seen by Mr. Kim during the rest of her stay at the Wayne County Jail (Vol. IX, 142-143). In response to a question as to why he did not spend at least ten (10) minutes a day with Linda during her stay at the Wayne County Jail, You Kim testified that every Thursday he had a staff meeting and that the psychiatric social workers, who were assigned, could handle the problem without getting the psychologist or psychiatrist involved (Vol. X, 29-30). Dr. Kim further stated that it did not take a lot of training to detect a psychotic episode. He opined that any layman could detect a

a psychotic episode (Vol. X, 20). Linda Rushing testified, contrary to the Defendant You Kim, that she did not see any other social workers or psychologists while she was at the jail (Vol. XI, 50). There were no records of the psychiatrist, Dr. LeBedevitch, seeing the Plaintiff, although he generally kept records (Vol. IX, 38). The Plaintiff's Dilantin medication was not given to her on three (3) of the four (4) days that she was present in the jail (Vol. XI, 48-49). A blanket given to the Plaintiff by another inmate, was taken away by a deputy (Vol. XI, 44). During this time, the Respondent's mother also attempted unsuccessfully to get treatment for her (Vol. V, 18).

While Ms. Rushing was unclothed, a janitor, at least once or twice a day while in front of her cell, would lean on his broom and stare at the undressed Plaintiff (Vol. X, 56). Also, on one occasion, while Ms. Rushing was sitting on the commode, he started whistling at her (Vol. X, 54, 55). This incident caused Ms. Rushing to feel very dirty and cheap (Vol. X, 56). Indeed, while in the cell following these occasions, Linda began to hallucinate that she was seeing her deceased

grandmother (Vol. V, 100; Vol XI, 50). In addition, she heard other non-existent voices calling out to her (Vol. XI, 81).

On the day that the Plaintiff was released from the jail, a tour of medical students was conducted within the women's ward, which housed the Plaintiff (Vol. V, 108-109, Vol. XI, 52-53). Approximately ten (10) to twelve (12) men, who were dressed in suits, "inspected" the Plaintiff and the cell while she was unclothed (Vol. XI, 52-54).

At the trial, expert testimony was presented as to the cruelty of what occurred: Since the inmates who were allegedly suicidal were already suffering from psychological personality disorders, it was unnecessarily cruel to increase their misery by exposing them to members of the opposite sex. This could only hurt their condition (Vol. XIII, 28). Additionally, the simple expedient of paper gowns was suggested if males had to be in the vicinity. (Vol. XV, 59).

Mr. Wilkerson, the Jail Administrator, set policies for the Wayne County Jail (Vol. XVI, 24). Wilkerson did not know whether male janitors were on the fourth (4th) floor area where naked, potentially suicidal women were housed (Vol. XVI,

50-53). Mr. Wilkerson noted that it was possible for men to be on the fourth (4th) floor where ladies were naked (Vol. XVI, 44). There was no policy which prohibited this practice (Vol. XVI, 45). For instance, Wilkerson said if there were a shortage of female personnel, male maintenance persons still had to get the job done regardless of whether naked ladies were housed in the area (Vol. XVI, 47-48). Consistent with this reasoning, there was no prohibition against people who sold cigarettes and sundry items from being in the area where unclothed women were housed (Vol. XVI, 51). Mr. Wilkerson did not recall ever having written any policy prohibiting the exposure of naked inmates; and no specific policy existed prohibiting classes of students, custodians, or cigarette sellers from being in this area (Vol. XVI, 73-74). The psychiatrist was given complete discretion to treat inmates (Vol. XVI, 101-104). Paper gowns were not used to shield inmates. (id)

The effect of this gross invasion of personal privacy and denial of psychiatric attention on Linda Hartley Rushing, during her jailing, was almost immediate. Ms. Rushing felt as

though she was an animal in a zoo and was dirty and cheap (Vol. XII, 70). Her reaction was very acute because of her great modesty as a child. She did not like to shower in the presence of others, even after her gym class (Vol XII, 63). She indicated that after the jail incident she was completely unable to cope with her problems (Vol. XII, 73). Her family confirmed that after the incident she became afraid to go out in public with people and became "like a vegetable" (Vol. XII, 100-101).

A treating psychiatrist testified that the Plaintiff's most sensitive area, her dignity and self-esteem were torn away by the jail incident and it became the precipitating cause for her feelings of utter humiliation, degradation and unworthiness (Vol. VI, 52, 55-56). The Respondent's condition was diagnosed as being a chronic psychotic depressive reaction (Vol. VI, 62). That is, she lost her ability to test reality, a form of nervous breakdown (Vol. VI, 62, 65). He believed that Ms. Rushing would have to undergo extensive medication for her condition (Vol. VI, 91). Antipsychotic medication was

necessary for Ms. Rushing given her delusions and hallucinations (Vol. VI, 91, 99, 101).

This is not the type of case where resort to "second guessing" is necessary. The nature of harm demonstrates a pattern of pervasive and systematic neglect amounting to deliberate indifference. Every time procedures were allegedly in place to provide care, there was sheer unmitigated failure. Linda Rushing was a pre-trial detainee known to be suffering from acute mental distress and diabetes. The Jail Reception and Diagnostic Center was ostensibly established to screen and determine special psychiatric and medical needs (Vol. VIII, 54). However, Linda was not processed through the Center (Vol. VIII, 53). Nor was this failure to process deemed unusual or a one time incident (Vol. VIII, 54).

Special cells and precautions were supposedly instituted to protect against the real threat of suicide for these persons, whose clothing was removed. However, in front of this acutely distressed, undressed modest woman, with no refuge, males were allowed to visually rape her (Vol. X, 54-55). Again, nothing unusual (Vol. XVI, 44, 50-53, 73-74).

Medical care and psychiatric care were supposedly present to treat illness (Vol. VIII, 92, Exhibit 4). However, except for one visit by a psychologist, who commanded her disrobing, there were no health care professionals who treated, *or even visited*, this acutely susceptible distressed woman (Vol. IX, 38; Vol. VIII, 136). Again, nothing unusual, nothing was amiss according to the Defendant (Vol. X, 29-30, 131; Vol. VIII, 141). The psychological staff had no overseer (Vol. VIII, 139). Prescribed medication was supposedly to be given to inmates. However, it was not, and it was pointed out, sometimes it is not returned for a period of seven (7) days. Both Frank Wilkerson and Carl Rector, two (2) high jail supervisory officials, indicated that the psychologist and psychiatrist had free rein to ignore detainees who were in need of prescribed medication and acutely psychiatrically ill (Vol. VIII, 139, Vol. XVI, 101, 103-104).

If unable to take care of Linda Rushing, she could have been sent to a hospital for care; the jail staff had that authority without a probate court order (Vol. XVI, 113). This was, of course, not done. Ms. Rushing's condition was much worse

following her incarceration (Vol. V, 104-113, Vol. VI, 92-93). Consequently, the wrongs, the constitutional torts, can be, and should be, attributed to the most culpable party, the defendant who itself caused the violations through its own policies, customs and pervasive neglect: the County of Wayne. The factual recitation of the Michigan Supreme Court is also incorporated herein.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER IS ASSERTING FOR THE FIRST TIME IN THIS COURT THAT IT ESTABLISHED AND IMPLEMENTED POLICIES FOR THE WAYNE COUNTY JAIL.

Petitioner is not claiming the original jurisdiction of this Court. Nevertheless, following fourteen (14) years of litigation, the Petitioner has conjured up an entirely different defense: that it established and implemented policies for the Wayne County Jail.

At trial, the position was maintained that the Petitioner was not involved in setting or implementing jail policies. The arguments of Petitioner's counsel during the successful

directed verdict motion demonstrate a completely opposite position to their present posture:

> "We have seen copious evidence in this court, Your Honor, that all the policies with regard to the way that the, alleged way that Linda Hartley Rushing was treated *were not in fact the policies of Wayne County despite the attempt of Plaintiff's Counsel on numerous occasions to get everybody to admit or attempt to get everybody to admit that these were policies of Wayne County.*
>
> There has been absolutely not one iota of evidence in this case that any of the policies arising out of which Linda Hartley Rushing was stripped, subjected allegedly to view by other people.
>
> The question of withholding medication and the question of either Mr. You Kim or Milas Lebedevitch seeing or not seeing her were policies of the County. As a matter of fact, it's been stated on numerous occasions that *these were policies of the Sheriff, a party that is not in this lawsuit. Absolutely not in this lawsuit.*
>
> *On this basis we believe that the County is improperly in this case under alleged civil right violations."* Petitioner's Appendix A-83, A-84 (emphasis added)

Later at trial, this same argument was reiterated as to the judicially-mandated orders that Petitioner has placed great—though belated—reliance on:

> "Secondly, *the County didn't implement the orders of the Circuit Court; the Wayne County Sheriff did.*
>
> *The County did what it was supposed to, it provided a building free from defects.* Plaintiffs have put absolutely no evidence in with regard to defect of a

> building save a minor toilet problem in that jail cell that Linda Rushing was in and in that instance there was absolutely no indication that that made the place uninhabitable or, in fact, Linda Hartley Rushing claimed to be injured or, in fact, was injured as a result of a leaking toilet." Petitioner's Appendix A-91

These arguments, while not hardy enough to survive to this Court, apparently found a sympathetic ear with the trial court as the following jury instruction of the Petitioner was given:

> "The County of Wayne is not charged with the administration of the County Jail, *nor does it implement nor execute policies therein*. Such authority resides with the Sheriff, a constitutional officer." (Vol. XX, 188)

On appeal to the Michigan Court of Appeals, the Petitioner persisted in claiming it had no responsibility to set policies and did not establish or implement any policies:

> "Based upon the evidence and the laws of this State, the *Court rightly ruled that the County has no obligation to the Plaintiff excepting the question of building defect* (Vol. 19, pg. 82).
>
> Appellant cites, in his Brief to this Court, a great number of cases, most of which are irrelevant, except to the extent that a close examination of same will demonstrate that *the government entity in those cases was the proper party to be sued*. That is so because the various state laws in the jurisdictions in which the litigation arose *gave those defendants in question the power to act (custom or policy)*." (Appellees' Brief On Appeal, p. 16) (emphasis added)

Again, in the Michigan Supreme Court responsibility was disclaimed:

> "Whatever policies, good or bad, legal or illegal that might be involved in this case, are not imputable to Wayne County's governing body. It has no authority to fix or set policy under *Monell*, thus, there is no liability." (Appellees' Supplemental Brief On Appeal, p. 10)

The Michigan Supreme Court specifically rejected this argument in the course of its opinion. (Petitioner's Appendix A-16, A-28)

Of course, the failure of the Petitioner to properly present an issue with fair precision and in due time to the highest state court precludes review by this Court. See e.g., *Street v New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *Pickering v Board of Ed. of Township High School Dist.*, 205, 391 U.S. 563, 88 S.Ct. 1731 (1968). The Petitioner is also not entitled to assert an inconsistent position. *New York, L.E. & W.R. Co. v Estill*, 147 U.S. 591, 13 S.Ct. 444 (1893).

a.) The Failure of Petitioner to Recognize Any Responsibility to Establish or Implement Policy Constitutes Positive Evidence as to the Inadequacy of that Policy.

This argument needs no elaboration. How could the Petitioner's policies have passed constitutional muster when it doggedly fought any suggestion it had any obligation to make policies? This is essentially the position of the Michigan Supreme Court.

b.) The Petitioner's Belated Reliance on Judicially-Mandated Orders as Establishing Policies for the Jail is Belied by the Absence of Any Proof of Compliance and the Necessity of the Michigan Court of Appeals to Appoint a Receiver for the Jail.

At trial, there was *no* evidence presented by the Petitioner that the Court ordered suicide plan was complied with. Although it was suggested that Circuit Court Judge John O'Hair, one of the three Judges involved in that case, would testify; he never was called. (Vol. XVII, 149; Vol. XVIII, 7) This was no hint of any evidence of this nature. The Court Order referred to and attached by the Petitioner to its appendix (A-116-126) was, in fact, introduced by Respondent. (Exhibits 7, 8) The issue at trial concerned what happened after Respondent was disrobed — not the fact of disrobing. The only evidence at trial indicated that written orders and regulations *were totally ignored.* For instance, according to the

Deputy Director of the Reception Center, a person classified "suicide acute temporary," pursuant to the jail manual (Exhibit 4), was supposed to be *reviewed daily by a psychologist* (Vol. VIII, 92, 135). Furthermore, a psychiatrist was obligated, pursuant to the manual, to *personally review the case* (Vol. VIII, 92, 135). Regardless of this rule contained within Exhibit 4, which was entitled "Sheriff, Wayne County Jail, Training Manual" (Vol. VIII, 83), the Deputy Director testified that whether a psychiatrist visited with the inmate-patient was *solely* up to the discretion of the psychiatrist, who had sole authority to determine the quality and extent of the care an inmate receives (Vol. VIII, 139). Consequently, the Deputy Director, contrary to the training manual (Exhibit 4), did not agree that a psychiatrist must see or that a psychologist should daily review the "acutely suicidal" inmate (Vol. VIII, 141; Vol. IX, 134) *id.* In this case, Linda Rushing was abandoned by the mental health staff. (supra)

Significantly, the Petitioner in its "STATEMENT" in support of its Petition informs this Court as to the convening of a three (3) Judge panel to superintend control of the Jail in

Wayne County Jail Inmates, et al v Lucas, 391 Mich 359, 216 NW2d 910 (1974). While the beginning of the story is told: "The Court ordered that judicial supervision of the jail begin to make the jail 'suitable and sufficient' for inmates" (Petitioner's Writ p. 2); the rest of the story is not. Part of that can be read in *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 444 NW2d 549, 559 (1989), which involved continuation of the same litigation. The findings in Part II of this eighteen (18) year saga reflect the same type of long term, callous, systemic failures, amounting to deliberate indifference, as present in the instant case:

> "Psychiatric prisoners are housed under conditions which are counter-therapeutic and degrading.
>
> • • •
>
> Insufficient supplies exist to provide a replacement for prisoners while the gowns are being washed. Consequently the monitors and their consultant observed, even on their follow-up inspection in the fall of 1988, several inmates were left naked in their cells during the gown-washing cycle.
>
> Screening is wholly inadequate. Many inmates are placed in psychiatric wards with no screening at all. Evaluation is often undocumented, and care plans are virtually nonexistent. The psychiatrist sees acute

patients on a follow-up basis every six weeks and nonacute patients every twelve weeks. Many charts reflect no follow-up whatsoever. Staff psychologists perform follow-up evaluations roughly once per month. This level of care falls short of the community "free standard" required under the final judgment.

Policies and procedures for psychiatric services are virtually nonexistent. There is no in-service training. Supervision is minimal, and there are no quality control mechanisms.

• • •

No purpose would be served by prolonged, detailed recitation of the medical care deficiencies in the jail. Again, a serious attempt at providing medical care consistent with the community "free standard" of the final judgment is not present, both as to staffing levels and staffing supervision. The medical director does not train the staff or evaluate them. Meetings with other jail physicians are rare. Medical histories are not thorough, and records are so badly organized they are virtually unavailable."

Certainly, the assertion that the Petitioner did not deviate from the judicially-mandated requirements is false: a receiver was, of necessity, appointed to oversee the Wayne County Jail. The Petitioner will have an opportunity to present evidence as to its policies and compliance with the suicide prevention plan at the retrial of this matter — if it does not revert to its former argument.

II. THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY WAS NEVER CHALLENGED IN THIS CASE.

Although the Petitioner now opines that there were no constitutional violations, based on privacy concerns, arising out of the repeated unexplained viewing of an unclothed Ms. Rushing by a janitor, students and guards, prior to this Petition no such trepidations were expressed. The Michigan Supreme Court opinion alludes twice to the Petitioner's failure to dispute the constitutional right to privacy. (Petitioner's Appendix A-22-23 f.n. 4; A-24 f.n. 6) By the same token, the Petitioner never indicated that the law in this area was unsettled. Nor was there any evidence from Petitioner as to any reason or justification why males were allowed to continuously view the unclothed Respondent. For instance, there was no showing that a female janitor or female guards were not available, or that suicide gowns could not be used.

a.) A Violation of Constitutional Rights Occurred Through the Invasion of the Plaintiff's Privacy.

There should be little dispute but that the sanctioned, continuous viewing of Linda Rushing's naked body by male jail employees who (1) helped disrobe her; (2) cleaned the floors; and (3) were escorting a group of male students constituted an invasion of Linda Rushing's constitutional right of privacy. The leading case, which has recognized this proposition is *York vs. Story,* 324 F2d 450, 455 (9th Cir. 1963):

> Nor can we imagine a more arbitrary police intrusion upon the security of that privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest that the photographs would show no injuries, and at a time when a female police officer could have been, but was not, called in for this purpose, and to distribute these photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault.

The privacy rights of an inmate were held to be superior to the employee's rights for equal job opportunities:

> In none of these cases, however, did the courts find the employees' interest in equal opportunities sufficiently compelling so as to override the inmates' privacy rights. Therefore, the Court must find that the plaintiff's rights were violated by the assignment of

female guards to posts where they could view him while he was completely or entirely unclothed.
Hudson vs. Goodlander, 494 F.Supp. 890, 893 (D. Md. 1980).

b.) An Additional, Adequate, Basis for Supporting the Michigan Supreme Court's Opinion Exists.

The concurring Opinion of Justice Boyle of the Michigan Supreme Court, which specifically was not rejected by the lead opinion, was based on the failure to provide mental health care and medication to the Respondent during her four (4) day stay. It is noteworthy that this independent basis of liability, including the federal authority relied upon by Justice Boyle, remains unchallenged by the Petitioner before this Court.

III. THE MICHIGAN SUPREME COURT REMAINED FAITHFUL TO EXISTING PRECEDENT WHICH ALLOWS GOVERNMENTAL LIABILITY UNDER 42 U.S.C. § 1983 FOR CUSTOMS ALTHOUGH THE WRITTEN POLICIES ARE CONSTITUTIONAL.

Following an exhaustive review of legislative history, this Court in *Monell v New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d. 611 (1978), ruled that municipalities could be held liable where the governmental

unit itself was responsible for the constitutional violation at issue. Liability was not restricted to "officially adopted and promulgated" policies or orders:

> [L]ocal governments, like every other S1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613 26 L.Ed.2d 142 (1970); "Congress included customs and usages [in S1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law. 43 US at 691, 98 S.Ct. at 2036.

Further elaboration was provided by the *Monell* Court in footnote 56, which relied on a previous opinion of Justice Frankfurter:

> See also Mr. Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co. v Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940):
>
> > "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and *to disregard the gloss which life has written upon it.* Settled state practice . . . can establish

> what is state law. The Equal Protection Clause did not writ an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." (Emphasis added).

In this case, what was written was "daily review" by a psychologist and "personal review" by a psychiatrist. The "gloss which life has written upon it" was *no* daily or personal review: no care. It was this framework that the Michigan Supreme Court used.

The question remained, however, as to whether or not liability would rest with a governmental unit which had an admittedly constitutional policies and customs, if those policies were not executed in the field. That is precisely the question which is presented in this case, and precisely, the question presented in *City of Canton v Harris,* 489 US 378, 109 S.Ct. 1197 (1989). The Michigan Supreme Court's application of *Harris*, in the lead opinion, to this case is easily supportable based on unwritten policies.

> By analogy to *Harris*, if a city may be said to have a policy for which it may be held liable if it fails to train employees adequately, then the outright failure to formulate any policy (which might in turn require

> instruction to be properly implemented) in the face of an obvious need to do so may also suffice to create liability. Otherwise, a municipality could avoid liability by simply ignoring an obvious need. This, however, was clearly not the Court's intention in *Harris*. The very notion of deliberate *indifference* contemplates a *failure* to act when the need to do so is obvious. (Petitioner's Appendix A-23)

The concurrence of Justice Boyle took a similar position with regard to *Harris*, although based on an Eighth Amendment (U.S. Const. Amend. VIII) grounds of denial of psychiatric care:

> A factfinder could reasonably conclude that a suicidal woman who is stripped nude except for underpants and placed in a jail cell has a serious medical need for continued psychiatric review and monitoring.
>
> Moreover, there is evidence from which a jury could conclude that the policy of granting total discretion to the psychiatric staff with regard to the treatment of stripped and suicidal patients represents deliberate indifference on the part of the Jail Administrator. As previously noted, having reviewed and approved jail procedures calling for a daily review by a psychiatrist of persons classified as potentially acutely suicidal, the administrator was aware of the need for such review, for purposes of monitoring as well as possible reclassification. The policy, whether it is characterized as one of nonenforcement of written procedures, of nonsupervision of psychiatric personnel, or of complete delegation of discretion to psychiatric personnel, under the circumstances may be found to be a policy of deliberate indifference. (Petitioner's Appendix A-36)

In contradiction to this lucid analysis, the dissenting opinion below appears to require almost specific intent. Certainly, a viewpoint inconsistent with this Court's holdings. Likewise, the Michigan Court of Appeal's Opinion requires enunciated unconstitutional policies. Adoption of these rulings is not in harmony with *Monell* or *Harris*.

CONCLUSION

The Writ of Certiorari should be denied.

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(3)

No. 90-1020

In The

Supreme Court of the United States

October Term, 1990

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Petitioner,

v

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Respondent.

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BRIEF FOR THE MICHIGAN MUNICIPAL LEAGUE AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER WAYNE COUNTY

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QUESTION PRESENTED

WHETHER WAYNE COUNTY CAN BE LIABLE UNDER 42 U.S.C. § 1983 FOR FAILURE TO TRAIN ITS EMPLOYEES, WHERE RESPONDENT, A SUICIDAL PRETRIAL DETAINEE, HAD BEEN PARTIALLY STRIPPED OF HER CLOTHING PURSUANT TO COURT ORDER AND WAS ALLEGEDLY VIEWED BY MALES, WHERE EXTANT POLICY PROHIBITED SUCH EXPOSURE, AND WHERE THE PRIVACY RIGHT ASSERTED HAS NEVER BEEN CLEARLY ESTABLISHED?

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE MICHIGAN MUNICIPAL LEAGUE AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER WAYNE COUNTY

This submission is made with the consent of both parties pursuant to Supreme Court Rule 37. Letters expressing their consent are on file with the Clerk of the Court.

The Michigan Municipal League, a non-profit Michigan corporation, is comprised of 501 Michigan cities and villages, including 188 cities and villages comprising the Michigan Municipal League Defense Fund. The filing of this Brief *Amicus Curiæ* has been authorized by the Board of Directors of the League's Legal Defense Fund, in light of the Michigan Supreme Court's misinterpretation of *City of Canton* v. *Harris*, 489 U.S. 378 (1989), which erroneously allows imposition of respondeat superior liability on the petitioner. The Michigan Supreme Court's opinion has significant consequences to governments caught in the "Catch 22"

of accommodating the privacy rights of pretrial detainees against the rights of male and female employees to full and equal employment opportunities.[1] The opinion further creates conflicts about the appropriate federal standards governing failure to train cases among Michigan's highest court, the Sixth Circuit, and this Court.[2]

STATEMENT

1. Respondent Linda Hartley Rushing was arrested on a charge of obstruction of justice and housed as a pretrial detainee in the female ward of the Wayne County Jail from June 8 through 12, 1976 when she was released on bond. (Pet. p 4, n. 1).

2. On June 9, 1976, respondent's sister telephoned Wayne County Jail investigator John Nicoll, informing him that respondent had threatened suicide. Pursuing his duty to protect a potentially-suicidal inmate, the jail investigator immediately notified the personnel on respondent's ward, the jail doctor, psychologist and psychiatrist of that threat. (*Rushing* v. *Wayne County*, 138 Mich. App. 121, 358 N.W. 2d 904 (1984)).

Consistent with a three-month-old Circuit Court Order (Pet. App. A-116), jail psychologist You Kim, whose principal assignment was the diagnostic evaluation of mentally ill and suicidal individuals, immediately ordered respondent to be stripped of all of her

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[1] See, e.g., *Griffin* v. *Michigan Department of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982).

[2] See, e.g., *Rushing* v. *Wayne County*, 436 Mich. 247, 462 N.W. 2d 23 (1990); cf. *Danese* v. *Asman*, 875 F.2d 1239, 1245 n. 4 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990); *Beddingfield* v. *City of Pulaski*, 861 F.2d 968 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 1473 (1990); *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985).

clothing except her underpants. The jail psychologist then interviewed the respondent. He determined that she was not psychotic but suicidal-acute, the most serious classification of suicidal inmates. During this interview, respondent told the psychologist she was epileptic and needed Dilantin. The psychologist conveyed this information to the jail physician. Neither the jail psychiatrist nor psychologist saw respondent during the remainder of her detention.[3]

3. For safety reasons, including the protection of her own right to life, the respondent remained partially unclothed during the remainder of her confinement.

4. Under prevailing Michigan Department of Corrections general policy, and the controlling court order, a suicidal inmate was required to be kept under continuous observation.

5. Further, pursuant to policies promulgated by Wayne County jail administrator Frank Wilkerson, male personnel were not generally assigned to female wards. While male custodial personnel could be assigned, they were only permitted on the female ward if directly supervised by female officers. Male deputies could enter the female ward in case of emergency or problems with inmates.

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[3] The Michigan Court of Appeals' opinion observed that respondent received epileptic medication for two of the four days of respondent's confinement. For some unknown reason, she was not supplied with medication for the remaining two days. An inadvertent or negligent failure to provide medical care does not state a constitutional violation. *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Davidson* v. *Cannon*, 474 U.S. 344 (1986) (negligence action for medical malpractice not within due process protection).

Michigan Supreme Court Justice Boyle's concurring opinion would remand only on the question of the County's deliberate indifference to respondent's medical needs. The Michigan Supreme Court majority did not reverse on this issue. Instead, it interpreted 42 U.S.C. § 1983 municipal liability policy cases adverse to Wayne County on the privacy question.

6. The respondent's original complaint and amended complaint, filed in 1977 and 1981, respectively, alleged that the jail psychologist and jail psychiatrist violated 42 U.S.C. § 1983 [4] by allowing respondent to remain unclothed except for her underpants in view of other women and male jail employees.[5] She specifically alleged that petitioner permitted a male janitor as well as a group of male visitors to view her in an unclothed state, despite her requests for clothing and shielding from the view of others. Respondent asserted that Wayne County and the individual defendants deliberately ignored her requests and behaved with conscious indifference and malice, an apparent respondeat superior claim. Further, respondent's complaint gener-

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[4] 42 U.S.C. § 1983 (1976), states in pertinent part:

> [E]very person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] Respondent's 1981 amended complaint alleged that the jail psychologist and psychiatrist caused her:

> [t]o be needlessly disrobed and to remain disrobed in a prison cell for several days, except for some small panties. That during this time the Defendants intentionally compelled the Plaintiff to remain disrobed, she was in full view of other persons, including several male employees of the Wayne County Sheriff's Department, a male janitor, as well as during interviews and tours of the jail . . . that despite repeated requests to jail personnel for clothing . . . and requests that Plaintiff be shielded from the view of others, the Defendants deliberately ignored such requests and behaved with conscious indifference and malice.

(Respondent's Amended Complaint ¶ 8).

ally averred that Wayne County had violated her constitutional rights.[6]

The respondent's complaints never alleged a distinct theory of County liability involving deliberate indifference on explicit policy, custom, or failure to train grounds.

7. Respondent presented no evidence whatsoever at her 1981 trial that Wayne County either inadequately trained or failed to train its employees.

8. At trial, respondent testified in conformity with the allegations in her complaint. She testified, for example, that a male custodian came by her cell several times and stared at her. She also claimed that a tour group, including the jail psychologist, came by her cell and laughed. (By its verdict of no cause, the jury obviously rejected this claim against the jail psychologist.) (Pet. App. A-56).

9. The jail administrator, acting within the constraints of the court-ordered suicide prevention plan, testified that while separate facilities were available for potentially suicidal male inmates, suicidal women were housed in the women's fourth floor annex along with non-suicidal women inmates. A suicidal woman would occupy a "suicide-proofed" cell in compliance with the court order.

10. The jail administrator also testified that he delegated decisions about the conditions of a suicidal inmate's confinement to the jail psychologist and psy-

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[6] Respondent alleged that the jail psychiatrist, jail psychologist and Petitioner deprived her of the due process right to "life, liberty, privacy and her constitutional right to adequate medication while a prisoner," thereby subjecting her to cruel and unusual punishment. (Amended Complaint ¶ 16).

chiatrist. He stated he was reluctant to substitute his opinions for those with expertise.[7]

11. The jail administrator had no specific policy prohibiting the exposure of stripped inmates. However, it was the custom at the jail in 1976 for female employees to handle female inmates. Further, the jail administrator insisted that a jail matron announce the impending presence of a male and accompany him onto the floor. The shift supervisor corroborated this testimony.[8] Finally, while student tours were allowed, a policy prohibited tour groups from walking by cells where unclothed females were housed.[9]

12. At the close of proofs, the trial judge directed a verdict for Wayne County, but permitted the 42 U.S.C. § 1983 claims against the jail psychologist and psychiatrist to be considered by the jury. The jury returned no cause for action verdicts in favor of the jail psychologist and psychiatrist.

13. On appeal, the Michigan Court of Appeals affirmed the directed verdict for petitioner, noting the court-ordered suicide prevention plan. (Pet. App. at A-56). The questions presented by the respondent in the Michigan Courts did not raise either a deliberate indifference/failure to train theory of liability. The Michigan Supreme Court initially granted leave to appeal, and later vacated its grant of leave to appeal. On rehearing of the order

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[7] *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (due process requires that the state provide involuntarily-committed mental patients with services sufficient to guarantee reasonable safety to themselves and others).

[8] She stated that practice and custom at the jail did not permit male deputies to be present when clothing was removed from a female inmate.

[9] There was no record of a tour during the days when respondent was incarcerated at the Wayne County Jail.

vacating its grant of leave to appeal, the Court first directed submission of briefs about the applicability of *City of Canton* v. *Harris*, 489 U.S. 378 (1989).

DISCUSSION

The Michigan Supreme Court remanded this case on a 42 U.S.C. § 1983 theory first presented 13 years after respondent's arrest and detention. The Michigan Supreme Court ruled, after *Canton* was decided, that respondent Rushing had been *unnecessarily* exposed in her semi-naked state to males. The Court suggested that a jury could properly find that Wayne County had been deliberately indifferent to the respondent's constitutional rights against being viewed by males because it had failed to train its employees. It found a federally-protected privacy right based on a selective and under-inclusive survey of cases, not one presenting the unique circumstances of a truly suicidal pretrial detainee whose clothing was removed pursuant to a court-ordered suicide prevention plan.[10]

The Michigan Supreme Court's misreading of *Canton* wrongly allows the *de facto* imposition of respondeat superior liability, contrary to *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978). The Michigan Supreme Court deviated from the culpability standards of *Canton* which require proof of two elements:

> 1.) inadequacy of training relative to the specific tasks the employee must perform;
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> 2.) a deficiency in training closely related to the ultimate injury.

109 S. Ct. at 1205-1206.

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[10] Cf. *Fisher* v. *Washington Metro Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982) (feigned suicide attempt).

In this instance, the Michigan Supreme Court's failure to train analysis is badly flawed. Respondent's general allegation that she was detained in a semi-nude state and unnecessarily observed by others states no constitutional violation since a court order required respondent to be stripped to prevent jail suicides.

Apart from this general allegation, respondent principally argues that a male custodian stared at her several times, and that a group of male visitors passed by her cell and laughed. No training program could cure such wrongs. Municipalities would not regularly offer training classes on privacy rights of stripped inmates to maintenance-level employees. Nor would tour groups visiting a custodial institution ever receive the sort of training which the opinion suggests. Thus, no causal connection exists between the alleged training deficiency and the wrongs of which respondent complained. Additionally, policy then in force generally required female guards on the female ward.

Moreover, the privacy right of a suicidal pretrial detainee against being viewed in a semi-naked state, the predicate for the Michigan Supreme Court's remand, was not clearly established in 1976, nor at any time since. Generally, as long as jail officials have no intent to punish, a pretrial detainee retains those privacy rights not inconsistent with legitimate security needs of the institution. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The prevention of suicide is a legitimate security need of the institution. As such, a suicidal pretrial detainee's right not to be viewed in a semi-naked state by members of the opposite sex is properly subordinated to the state's paramount interest in protecting her life and the institution's security. Where a legitimate professional judgment as to the conditions of confinement has been made, as one plainly was here,

the due process clause is simply not offended. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982).

ABSENCE OF POLICYMAKING DISCRETION

The touchstone of municipal liability pursuant to 42 U.S.C. § 1983 (1976) is the execution of official policy which causes a deprivation of rights secured by the Constitution. *Monell*, 436 U.S. at 694. The full contours of municipal liability under 42 U.S.C. § 1983 have yet to be developed. This case poses issues still unsettled in § 1983 jurisprudence after *City of Canton* v. *Harris*, 489 U.S. 378 (1989), *City of St. Louis* v. *Praprotnik*, 485 U.S. 121 (1988), and *Jett* v. *Dallas Independent School District*, __ U.S. __, 109 S. Ct. 2702 (1989).

In *Monell*, this Court held that municipal liability arises under 42 U.S.C. § 1983 only when "a governmental policy or custom" itself inflicts a constitutional injury. 436 U.S. at 694. Further, respondeat superior was held to be an inappropriate theory of municipal liability under § 1983. 436 U.S. at 691.

In *Canton*, the Court addressed the issue of municipal liability under § 1983 for failure to train its employees. Building on *Monell*, *Canton* held that municipal liability will attach only where "a municipality's failure to train its employees in a relevant respect evidences a *deliberate indifference* to the rights of inhabitants. Such failure may then constitute a policy or custom that is actionable under § 1983." 109 S. Ct. at 1205 (emphasis added). The *Canton* Court further admonished that:

> Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality — a "policy" as defined by our prior cases — can a city be liable for such a failure under § 1983.

109 S. Ct. at 1205.

Canton did not consider whether, under *Praprotnik*, a municipality can be held liable for a policy of deliberate indifference when the policymaker has little discretion and the parameters of the constitutional right at issue are ill-defined.

In *Praprotnik*, a plurality of this Court concluded that the decisions of a municipal officer constitute a policy attributable to a municipality, exposing it to liability under § 1983, only when the municipal official makes "final policy" pronouncements. *Praprotnik*, 108 S. Ct. at 919, 926, *quoting Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986). Specifically, the Court opined that:

> *When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality.*

108 S. Ct. at 926.

The need to harmonize *Praprotnik* and *Canton* is apparent in this case. The decision here rested entirely on the Michigan Supreme Court's construction of federal law, a construction clearly at odds with this Court's holdings. The Michigan Supreme Court held:

> [W]ith respect to the failure of jail policymakers to adequately train jail personnel, the jury could have found not only that policymakers failed to instruct employees in the constitutional limitations on the stripping and exposure of inmates, but also to formulate any policy in this regard.

436 Mich. at 262.

But the Michigan Supreme Court did not explain the scope of policymaking authority, since County officials

were bound to obey, and had no discretion to deviate from, the court-ordered suicide prevention plan. (Pet. App. A-116). As Petitioner notes, the Michigan Court of Appeals found these orders so explicit that little discretion was left to the Sheriff or jail administrator, quoting *Layton* v. *Quinn*, 120 Mich. App. 708, 328 N.W. 2d 95 (1982), *judgment vacated*, 422 Mich. 899 (1985). (Pet. at p 3). Thus, under *Praprotnik*, as the jail administrator was constrained under policies not of his own making, the court-ordered suicide prevention plan constituted the policy of petitioner Wayne County. Therefore, under the *Canton* standard of deliberate indifference, the jail administrator could not have made a deliberate or conscious choice to violate petitioner's constitutional rights, and liability should not attach.

Certainly, this Court in formulating the standards of municipal liability under § 1983 did not intend to impose liability for policies outside municipal control, and expose municipalities to liability for failure to train under those same external policies.

ABSENCE OF NOTICE – OF A CLEARLY ESTABLISHED RIGHT

A municipality's failure to train its employees must amount to a *conscious* choice to ignore the constitutional rights of citizens. *Canton*, 109 S. Ct. at 1205. A standard of deliberate indifference should rest on a finding that the municipality was *on notice* of constitutional injuries. 109 S. Ct. at 1205, n. 10. This view comports with Justice O'Connor's concurrence in *Canton:*

> Without some form of notice to the city, and the opportunity to conform to constitutional dictates . . . the failure to train theory of liability could completely engulf *Monell.*

109 S. Ct. at 1208. Recognizing the fundamental importance of notice of constitutional injuries, various circuits have explicitly or implicitly required notice prior to imposing liability on municipalities. *Kerr* v. *City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989); *Merrit* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989); *Bordanaro* v. *McCloud*, 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 75 (1989).

Fair notice to a municipality of constitutional injuries requires a "pattern" of such violations, so that a municipality can be said to have a policy or custom to ignore violations of those rights. *Canton*, 109 S. Ct. at 1209-1210. *See also: City of Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*).

Second, notice of ongoing constitutional violations also requires that the constitutional right at issue be sufficiently defined so that a municipality can implement policies to prevent its violation. Without such definition, municipalities are without "clear constitutional guideposts" and the potential for liability becomes unlimited. *Canton*, 109 S. Ct. at 1209. *Danese* v. *Asman*, 875 F.2d 1239, 1245 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990) also recognized that:

> If the officers were not subject to a clearly established Constitutional duty, their supervisors cannot be liable for not training them to meet such duty.

Lack of notice in both forms exists in this case. Respondent never alleged or established a pattern of constitutional violations in the instant case. She did not demonstrate that other suicidal detainees were subjected to observation by members of the opposite

sex. Further, the contours of the right respondent alleges was violated has never been defined in this Court. Indeed, the courts are divided as to the existence of and nature of such a right.

ILL-DEFINED CONSTITUTIONAL RIGHTS AND ILL-DEFINED TRAINING RESPONSIBILITIES

If Wayne County had, in 1976, held a training class on the "constitutional limits of stripping and exposing suicidal inmates," as the Michigan Supreme Court suggested, what might the students have learned? First, this Court has never explicitly recognized such a right. Second, no cases in 1976 had considered this problem!

The legal landscape of federal circuits and state courts considering the question since 1976 have presented a host of divergent views. The Michigan Supreme Court found a constitutionally-protected privacy right against viewing by opposite-sex guards, without carefully considering a broad range of post-1976 case law balancing the Title VII rights of prison employees against the retained privacy rights of pretrial detainees/prison inmates.

The theory that respondent was *unnecessarily* exposed to the view of members of the opposite sex lacks constitutional validity. How much observation of a potentially suicidal inmate is too much observation? In *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Third Circuit found Upper Darby Township jailers could be held responsible under 42 U.S.C. § 1983 for failing to adequately monitor individuals who were suicide-prone. Applying *Colburn*, no amount of observation of a suicidal inmate can constitute a § 1983 violation. What the Michigan Supreme Court ignored is the state's duty to care for those confined to its custody, which requires

monitoring of those prone to suicide. *Partridge* v. *Two Unknown Police Officers*, 691 F.2d 1188-1189 (5th Cir. 1986). See also: *DeBow* v. *City of East St. Louis*, 510 N.E. 2d 895 (Ill. App. 1987), *app. denied*, 116 Ill. 2d 552, 515 N.E. 2d 105 (1987); *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990).

Following *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Sixth Circuit set out the proper analytic framework for suicidal pretrial detainees. In *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985), the court recognized that pretrial detainees retain privacy rights not inconsisternt with the legitimate security needs of the institution, as long as there is no intent to punish. The Court also transposed *Bell* v. *Wolfish* failures to train in suicide prevention, and ruled that a failure to provide better suicide prevention training and employ better-trained employees did *not* constitute a constitutional violation:

> If a failure to act is reasonably related to a legitimate governmental objective, the failure to act cannot have the purpose of punishment unless the failure to act was deliberate. *Bell* v. *Wolfish* requires an intent to punish. Absent intent to punish, the police chief's failure to provide better suicide prevention training and to learn about and implement a new regulation and the City of Troy's failure to employ better trained jailers do not amount to constitutional violations because the failures arose from the allocation of resources, time, personnel, and money, which constitutes a legitimate governmental purpose.

773 F.2d at 725. See also, *Danese* v. *Asman*, 875 F.2d at 1245 (suicide training not required); *Beddingfield* v. *City of Pulaski*, 861 F.2d 968 (6th Cir. 1988) (standard of

proof is that a city *deliberately* sets out to train police officers inadequately in suicide prevention.)

TITLE VII RIGHTS OF JAIL/PRISON EMPLOYEES

The question of underlying privacy rights of a suicidal pretrial detainee is further clouded by the clash between privacy rights and Title VII rights of jail/prison employees.

In a significant Eastern District of Michigan court order, Judge (now Chief Judge) Julian Cook held that the Title VII rights of female correctional officers in the Michigan Department of Corrections required the assignment of females to formerly-male positions in the state penal system. He rejected the argument that same-sex guards were mandated to protect the privacy of inmates. He flatly stated: "Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex." *Griffin* v. *Michigan Department of Corrections*, 654 F. Supp. 690, 703 (E.D. Mich. 1982). The district court hence rejected any such constitutionally-rooted privacy right; see analysis at 654 F. Supp. 701-703, and cases cited therein, especially *In Re Montgomery*, 9-18-78, California Superior Court: "once such a viewing is justified by the prison's need for security, the viewing is not demonstrably more significant whether by male or female."

In *Torres* v. *Wisconsin Department of Health and Social Services*, 838 F.2d 944 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989), 489 U.S. 1082 (1989), the Seventh Circuit also held that a policy designating female-only prison guards was a continuing violation of Title VII. The court there declined to find that the inmates' privacy rights dictated a same-sex guard. The court surveyed the state of law on inmate privacy

versus full employment rights of guards, 838 F.2d at 952-953. See also, *Hardin* v. *Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

In summary, not only were respondent's privacy rights limited by her pretrial detention, they were further severely limited by her suicidal condition under the terms of the court order governing suicide-prone detainees. As this Court recognized in *Praprotnik*, 108 U.S. at 922, the legal landscape was rife with "evolving definitions." In its holding, the Michigan Supreme Court inadequately analyzed the state of authority before reaching the facile conclusion that training of jail employees would have averted a constitutional harm which it too readily found existed on these unusual facts.

The proper disposition of this case is that proposed by the dissenting justices below. At worst, the proofs below show that a sound program was negligently administered. They do not show any deliberate municipal policy choice among competing alternatives which inflicted a constitutional harm. The proofs here were not sufficient to permit a jury to infer from a single incident that Wayne County had or has a policy of inadequate training and to sanction the inference that the policy caused a wrong.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari, vacate the judgment below, and reinstate the order of the Wayne County Circuit Court directing the verdict in favor of petitioner Wayne County.

Respectfully submitted,

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